Supreme Court, U.S.
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No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ROBERT E. HILL, individually and as parent and next friend of Tasha R. Hill, a minor; and CYNTHIA G. HILL, individually and as parent and next friend of Tasha R. Hill, a minor;

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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140pp

QUESTIONS PRESENTED FOR REVIEW

I. BY AWARDING THE GOVERNMENT A REVERSIONARY INTEREST IN AN OTHERWISE UNCONTESTED TORT JUDGMENT, DID THE COURT OF APPEALS IMPROPERLY GRANT THE GOVERNMENT PREFERENTIAL TREATMENT OVER ALL OTHER SIMILARLY-SITUATED TORTFEASORS, IN CONTRAVENTION OF THE FEDERAL TORT CLAIMS ACT?

II. DID THE COURT OF APPEALS DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS WHEN IT FAILED TO APPLY OR MISAPPLIED THE ABUSE OF DISCRETION STANDARD IN REVIEWING A FACTUAL FINDING BY THE DISTRICT COURT?

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May 18, 1994, Order (granting partial summary judgment) (D.Colo.)

November 27, 1990, Memorandum Opinion and Order (denying Defendants' motion to dismiss) (D.Colo.)

JURISDICTION

The Order and Judgment sought to be reviewed was entered on February 5, 1996, by the Tenth Circuit Court of Appeals. Hill v. United States, __ F.3d __, 1996 WL 162421 (10th Cir. 1996). Appendix at 1.

On March 21, 1996, Petitioners filed a Motion for Extension of Time to File Petition for Rehearing. On April 25, 1996, the Tenth Circuit Court of Appeals denied the Motion, and, therefore, Petitioners were time-barred from filing a Petition for Rehearing.

This Court has jurisdiction to review the Tenth Circuit's ruling pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1) The provision of the Federal Tort Claims Act, 28 U.S.C. § 2674, which states, in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment and for punitive damages.

2) The Colorado Health Care Availability Act, Colo. Rev. Stat. § 13-64-101 to -212 (1995 Cum. Supp.), a copy of which appears in the Appendix at page 68pa.

STATEMENT OF THE CASE

Tasha Hill suffered catastrophic injuries in October, 1988, while hospitalized at Evans Army Community Hospital due to the delay in diagnosis and treatment, and the inadequacy of treatment, of infantile spinal meningitis. From the time that her parents, Petitioners Robert and Cynthia Hill, filed an administrative claim under the Federal Tort Claims Act in 1989 up to the time of trial, in May, 1994, the government fiercely contested liability in this

matter. Then, on the third day of trial, the government admitted liability for Tasha's injuries. Hill v. United States, 854 F. Supp. 727, 729 (D. Colo. 1994), Appendix at 32pa-33pa.

As a result of the government's admitted negligence, Tasha sustained devastating, permanent neurological injuries that have severely impaired her physical and cognitive skills. Although Tasha was six years old at the time of trial, she functioned at the level of a six or seven month old infant. She will never be toilet trained and must be fed through a g-tube, which permits direct access to her stomach. Her injuries are permanent and there is no hope for physical improvement.

Despite the severity of her impairments, however, Tasha has a distinct personality and a limited ability to express pleasure and displeasure and, with good care, she can maximize her mental development and minimize her physical disabilities. Id. Further, despite these injuries, the district found that, with good care, Tasha has a normal life expectancy to approximately age 80. Id. Appendix at 34pa.

Since the time of her injury, Tasha has required 24 hour per day care and will need such full-time care throughout her life. Due to the nature of her injuries, Tasha requires skilled care, equivalent to that provided by a licensed practical nurse, 16 hours per day, and aide care during the night. Id. at 730. Appendix at 36pa. From the time that Tasha was discharged from the hospital in 1988 to the date of trial, Tasha was cared for by her parents. The district court described the parents' care as "exemplary," "selfless," "meticulous" and "outstanding." Hill v. United States, 864 F. Supp. 1030, 1032 (D. Colo. 1994), Appendix

at 21pa. None of these facts were in dispute in the government's appeal to the Tenth Circuit.

The district court awarded damages for the benefit of Tasha Hill in the amount of $13,528,400, of which amount the government has already paid $3,508,600, plus interest on this amount from June 9, 1994, to March 9, 1995. See Appendix at 11pa-12pa; 854 F. Supp. at 734-35, Appendix at 46pa-48pa. The damages paid to date on behalf of Tasha have been deposited, and all other monies received on her behalf in the future will be deposited, in the Tasha R. Hill Trust, created by order of the trial court. 864 F. Supp. at 1034, Appendix at 25pa.

On October 12, 1994, the district court denied a motion of the government for a reversionary interest in the trust, finding that a reversion in favor of the government was not in the interests of Tasha, pursuant to the rule established in Hull v. United States, 971 F.2d 1499 (10th Cir. 1992), cert. denied, 113 S. Ct. 1844 (1993). The court ruled that "there is not a shred of evidence" that such a reversion would serve Tasha's best interest. 864 F. Supp. at 1032, Appendix at 21pa. Further, the court ruled that the government's assertion of a reversion under the Colorado Health Care Availability Act (hereinafter "HCAA"), C.R.S. § 13-64-201, et seq., was barred by the government's express stipulation that the HCAA would not be applied to this matter. 864 F. Supp. at 1033, Appendix at 22pa-23pa.

The HCAA requires that future damages in medical malpractice case be paid in fixed, periodic installments. Although the government based its argument that it is entitled to a reversionary interest in the Tasha R. Hill Trust on the HCAA, the statute does not authorize such relief, and

Petitioners argue that imposition of a reversionary trust provides the government with treatment more advantageous than that accorded to private defendants in like circumstances.

In furtherance of a policy in favor of settlement of actions, Section 13-64-211 of the HCAA expressly permits the parties to agree that the periodic payment provision shall not apply to settlements and consent judgments. In this case, the government's stipulation that the HCAA does not apply was the subject of extensive discussion on the record throughout the trial court proceedings.

Prior to trial the government had steadfastly argued that the HCAA does not apply in this case. During trial, after a lengthy discussion, the parties openly and unambiguously stipulated that the HCAA would not apply. At trial, this issue was raised immediately prior to the testimony, by videotaped deposition, of the plaintiffs' economic expert, Dr. Larry Singell. The question of the applicability of the HCAA was pertinent at that point in the proceedings because Dr. Singell's testimony included two separate calculations of damages, the first being a traditional, present-value estimate of the damages sustained by Tasha Hill, with the most significant aspect of those damages being the cost of caring for Tasha over her expected life of seventy-four years from the date of trial. Secondly, Dr. Singell testified as to the specific costs, in inflated dollars, of providing the necessary care to Tasha Hill in each of the ensuing seventy-four years. This second area of testimony was necessary to comply with the HCAA's requirement that the finder of fact make separate and specific findings regarding future damages and the period of time over which they will be paid, C.R.S. § 13-64-204(1), and the

requirement that the judgment establish periodic payments that are "fixed and determinable as to amount and time of payment." C.R.S. § 13-64-206(1)(a).

Prior to the presentation of the videotaped testimony of Dr. Singell, plaintiffs' counsel reminded the trial court of the government's objection to the applicability of the HCAA. Trial transcript, Appendix at 83pa-84pa. In the colloquy that followed, the trial court discussed the government's argument that the HCAA should not be applied. Petitioners' counsel then indicated that Petitioners were willing to enter into a stipulation that the HCAA would not be applied, thus simplifying the work of the trial court and the parties. Petitioners' counsel therefore stated:

> We presented this to the Court because it's there and we didn't want to ignore it. But if the government doesn't feel like this Act is applicable, it's an enormous nightmare for everybody here, and the plaintiffs are perfectly willing to accept a court decision based upon the government's - or based upon the parties' agreement that the Act doesn't apply.

Trial transcript, Appendix at 89pa.

The government's counsel immediately responded by stating:

> Your Honor, the government's been willing to stipulate to that for as long as this issue has been brought up. They agreed to stipulate that the Act does not apply.

[Id.; emphasis supplied.]

Even if the discussion had ended at that point, there would be no ambiguity about the stipulation between the

parties. However, the conversation did not stop at this point, and the clarity of the stipulation was emphasized by the ensuing dialogue.

> THE COURT: If the parties want to stipulate away the applicability of this statute for the purposes of this Federal Tort Claims Act case, I would be willing to accept that stipulation. Now that doesn't mean that it is not helpful or instructive to break down on a periodic basis on discounted values an analysis of the damages. I mean that's helpful in any case. But if you want to stipulate away the applicability of this Act, I don't see why not.
>
> GOVERNMENT'S COUNSEL: Your Honor, I think the government has made that position clear from the beginning, and I think at the pretrial there was statements made by the government that they would stipulate to that, and it was the plaintiffs that-- during those pretrial conferences that said they couldn't or wouldn't.
>
> PLAINTIFF'S COUNSEL: Well, your Honor, I think that our concern was, frankly, that we weren't sure that we can appropriately do that. We haven't found law that tells us that we can't, and the court has indicated that it's willing to accept such a stipulation, so for practical reasons the plaintiffs are willing to stipulate that the statute doesn't apply.

Having spent a good part of my life here over the past couple of months trying to interpret the statute, I can sympathize and apologize for the Court's struggle. I think that there actually are a couple of nuances here that the Court didn't -- at least you didn't express here in your reading of the statute a couple of minutes ago, and I can go into that, but again --

THE COURT: Well, if it doesn't apply, then we don't need to get into these -- I mean I have been troubled enough with the statute anyway. You know, the only -- and I can't speak -- not only can't, but would not attempt to speak for the Tenth Circuit, but if everybody here agrees, and I accept the agreement, that the statute does not apply in this case, then it would seem to me that all parties are bound by that stipulation, and that on appeal there's nothing to be raised to be presented to the Tenth Circuit Court of Appeals.

PLAINTIFF'S COUNSEL: Well, your Honor, that's been the analysis that we finally came to. Obviously our only concern is protecting this matter on appeal, and it seems to us that if the parties stipulate that it doesn't apply, then there is nothing to be presented to the Court of Appeals on this issue.

> THE COURT: That seems rather basic and rudimentary to me. Do you agree, Mr. Taylor?
>
> GOVERNMENT'S COUNSEL: Yes, your Honor. That's kind of been our position for quite a while.

Appendix at 89pa-91pa.

In reliance on this stipulation, Petitioners informed the trial court that Petitioners' Exhibit 185-A, which detailed the date and amounts of periodic payments of damages as required by the HCAA, would not be offered into evidence. See footnote 5, at page 19, infra; Appendix at 96pa. In addition, in reliance on the stipulation, Petitioners did not ask the trial court to order that the periodic payments of damages would continue for a minimum "initial term," notwithstanding the possible death of Tasha Hill during that initial term, as provided by the HCAA. C.R.S. § 13-64-206(2).

Four weeks after the entry of judgment, at a conference on July 13, 1994, the government asserted that it was entitled to a reversionary interest in the trust under the provisions of the HCAA. When the government's counsel raised this issue, the trial court immediately responded, without prompting by Petitioners' counsel:

> Well the statute has been stipulated out of this case. We made a very clear record about that. The reversionary question is one that arises as a facet of the Court's inherent

> authority recognized by Hall [sic],[1] and I just simply don't believe that this statute applies at all.
>
> Certainly, there is nothing in Hall [sic] that indicates that one looks to a statute like this to determine whether to exercise jurisdiction to provide for reversion because the public policy expressed in that statute is one in favor of the tort-feasor, frankly. And the interest that guides me in looking at a reversion is the best interest of the child.
>
> The circuit has told me in essence to disregard the public policy expressed in the statute. And we have agreed by express stipulation that this case, a federal case, isn't going to be governed in any way by this statute.

Appendix at 104pa (emphasis supplied).

Subsequently, in the Memorandum Opinion and Order denying the government's motion for a reversionary interest, the district court made the following finding:

> The government remains bound by its unambiguous stipulation which was made on the record in open court and accepted by the court. Mills v. State Farm Mutual Automobile Ins., 827 F.2d 1418, 1422 (10th

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[1] The trial court's reference, misunderstood by the reporter, is to Hull v. United States, 971 F.2d 1499 (10th Cir. 1992).

> Cir. 1987). The government's penurious motivation is manifest. I will not allow the government to renege on the stipulation to gain a benefit for itself.

864 F. Supp. at 1033, Appendix at 22pa-23pa.

On appeal to the Tenth Circuit, the government did not contest its liability for the balance of the damages awarded on behalf of Tasha. However, the government appealed the district court's denial of the government's motion for a reversionary interest in the trust.

On February 5, 1996, the Tenth Circuit Court of Appeals issued its opinion reversing the district court's denial of the reversion. The sole basis for the ruling was the application of the HCAA to this case. Even though the government had expressly stipulated that the HCAA would not be applied, and the district court entered a specific finding of this fact, the Tenth Circuit failed to address or even mention the stipulation.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RE-AFFIRM THAT THE FEDERAL TORT CLAIMS ACT DOES NOT PERMIT THE GOVERNMENT TO RECEIVE PREFERENTIAL TREATMENT OVER OTHER TORTFEASORS IN LIKE CIRCUMSTANCES.

Controlling case law provides that, under the Federal Tort Claims Act, the United States is entitled to receive treatment equal to, but not more preferential than, private

tortfeasors under applicable state law. These opinions recognize that there exist circumstances under which it is not possible for the court to directly apply state law to the government for one reason or another. In those circumstances, courts have attempted to impose liability and to fashion remedies analogous and essentially equivalent to the treatment accorded private tortfeasors.

In this matter, however, the Tenth Circuit's order imposes a limitation on a tort victim's remedy that does not exist under state law, that ignores certain aspects of state statutory law governing tort judgments in similar matters, and that grants the government treatment substantially more advantageous than that accorded to private tortfeasors in like circumstances.

Petitioners therefore submit that this Court should grant certiorari to clearly establish that federal courts may not fashion remedies that are not provided for in state law or that provide preferential treatment to the government.

Before reviewing the controlling case law that has interpreted and applied the FTCA, it is necessary to understand the provisions of Colorado's Health Care Availability Act regarding damage awards in medical malpractice actions.

The HCAA requires that any judgment for future damages with a present value in excess of $150,000.00 must provide for periodic payment of these damages. C.R.S. § 13-64-203(1). The finder of fact is to make specific findings regarding past and future damages, including the period of time over which future damages are to be paid and the present value of the future damages. C.R.S. § 13-64-204(1)(b) and 205(1)(d). The statute provides that the court must enter judgment for the periodic payment of future

damages, including the specific dates and amounts of every periodic payment. C.R.S. § 13-64-205(1)(d) and 206(1)(a).

Subject to two important exceptions, payments for future damages cease upon the death of the injured party. First, damages payable for the loss of future income must be paid to the injured party's heirs after the injured party's death. C.R.S. § 13-64-206(3). Secondly, the court may order, "for good cause shown," that the periodic payments will continue for an initial term of years notwithstanding the death of the injured party. C.R.S. § 13-64-206(2). Thus, the trial court could order that the periodic payments should continue for a prescribed period of ten or twenty years even if the injured party should die during that term of years.

There are no provisions of the HCAA and no appellate decisions in Colorado that define "good cause shown" or that establish guidelines for an appropriate "initial term" for the periodic payments.[2] The Tenth Circuit's Order and Judgment makes no reference to this important statutory provision regarding an "initial term" for periodic payments.

The HCAA also requires that the judgment for periodic payments provide for those payments to be funded in one or more forms, including an annuity contract,

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[2] Such a provision may be appropriate, for example, to ensure that a defendant does not benefit by a reduction in damages where the defendant's own negligence has put the plaintiff's survival in doubt. In the present action, the trial court was not asked to make findings regarding the propriety or length of a "guaranteed" initial term of payments because of the parties' express stipulation that the HCAA did not apply to this matter. See Argument II, infra. Certainly, in the absence of this stipulation, Petitioners would have requested that the trial court find that good cause existed to order the periodic payments to continue during an extended initial period.

obligations of the United States or the State of Colorado, evidence of liability insurance, or an assignment agreement to assume the obligation. C.R.S. § 13-64-204. Once the form of funding is approved by the court and the funding of the obligation is accomplished, then the court orders that the judgment is satisfied and the judgment debtor is discharged. C.R.S. § 13-64-212. If the defendant is unable or unwilling to fund the periodic payments, then the court must enter judgment for the present value of those future payments. C.R.S. § 13-64-208(2).

Both the government and the Tenth Circuit misunderstood the method by which defendants discharge their obligations under the HCAA, an issue of great significance here. The Tenth Circuit's Order and Judgment states:

> The government does not claim that they are specifically subject to the HCAA, and, indeed, it is clear that the federal government may not be ordered to make periodic payments in the manner in which the HCAA provides.

Appendix at 6pa. Contrary to the arguments of the government and contrary to this statement of the Tenth Circuit, the HCAA never requires or allows a defendant to remain responsible for periodic payments. Either the defendant establishes an appropriate funding mechanism, C.R.S. § 13-64-207(1) and 208(1), or the defendant is ordered to pay the present value of the future periodic payments. C.R.S. § 13-64-208(2). In either case, the judgment is satisfied and the defendant is discharged upon payment of a lump sum.

The statute does not make any provision for any kind of continuing obligation for or any continuing interest in the funding mechanism of the future periodic payments. There is no reversionary interest for the benefit of any defendant contemplated by the statute.

The absence of a provision for reversionary interests, however, does not mean that defendants do not enjoy some benefit from the reduction of damages where there is doubt about the plaintiff's life expectancy. The defendant always has the right to select the funding mechanism, subject to the court's approval. If there is little doubt that the plaintiff will live out the term for which periodic payments must be made, then the defendant may elect to purchase government securities or another form of funding that does not involve an insurance company or another private entity seeking to make a profit on the transaction. In such a situation, it may be cheaper for the defendant to fund the future payments by government obligations than by contracting with a third party. Indeed, the defendant may prefer to simply pay the present value of the future damages if that is the least expensive funding mechanism. Certainly, where the defendant chooses or is ordered to pay the future value of the damages to satisfy the judgment, the defendant enjoys no reversionary interest in the damages paid. If the injured plaintiff dies prematurely, any estate passes to the heirs or devisees.

On the other hand, if there is any question about the longevity of the injured party, a defendant can choose to fund the obligation by annuity contract or assignment of the liability to a personal injury liability assignee. C.R.S. § 13-64-207(1)(a) and 207(1)(d). The underwriter of the annuity or the liability assignee, generally an insurance company,

can then take into account the actuarial probability of premature death and the termination of periodic payments. If the insurance company determines that it will probably not have to pay out the full award of future payments, the insurance company will reduce the cost to the defendant of the annuity or assignment. In that case, again, there is no reversionary interest for the benefit of the defendant because the annuity contract or assignment agreement provides for payment of future damages only up to the time of the plaintiff's death.

The provisions of the HCAA thus allow a defendant to propose the funding mechanism that is most economical to the defendant while still ensuring payment of future damages to the plaintiff. Further, the HCAA itself expressly permits the parties to enter into a settlement agreement or consent judgment that may or may not include periodic payments. C.R.S. § 13-64-211. Thus, even after a judgment for periodic payments has been entered, the parties could agree to settle the matter upon payment of a lump sum.

As noted, this statutory scheme does not include a provision for a reversionary interest for the benefit of any defendant. Although the statute does require the termination of most periodic payments upon the death of the injured party, the statute also creates mechanisms by which a defendant may reduce the cost of funding the judgment to take into account the possibility of premature death. Thus, the potential for the premature death of an injured plaintiff does not suggest that a court should create a reversionary interest where the statute provides none; such a potential suggests only that an annuity may be the best form of funding for a defendant.

Where no reversionary interest exists for the benefit of any private health care provider, the government's demand for such treatment here would provide it with treatment more advantageous than, and not similar to, the treatment of any private provider under the statute. For this reason, the Tenth Circuit's Order and Judgment mandating the creation of a reversionary interest in this case is contrary to the provisions of the FTCA and controlling case law.

The Tenth Circuit's error began with the misapprehension that the government could not be subject to the damages provisions of the HCAA because the HCAA requires a defendant to make periodic payments of damages, which would be contrary to the FTCA. Appendix at 6pa.[3]

However, as noted above, the HCAA does not require a defendant to make continuing payments. Any judgment must be satisfied by some form of a lump sum payment by a defendant. Thus, there is no provision in the HCAA with which the government could not comply consistent with the limitations of the FTCA.[4]

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[3] The Tenth Circuit cites Hull v. United States, 971 F.2d 1499, 1505 (10th Cir. 1992) and Frankel v. Heym, 466 F.2d 1226, 1228-29 (3d Cir. 1972) for the proposition that the FTCA does not allow the government to be subjected to a judgment requiring the payment of damages other than in a lump sum. Because the HCAA does not require any defendant to make periodic payments of damages, it is not necessary for this Court to consider whether or not the FTCA would bar such a judgment against the government.

[4] Even if it is assumed that the government cannot be required to fund the future periodic payments with government obligations or an annuity, the government could simply refuse to fund the periodic payments and thus be ordered to pay the present value of the future damages pursuant to Section 13-64-208(2) of the HCAA. That is, in effect, what happened in this action, where the government was ordered

The most analogous appellate opinions applying the FTCA consider statutory programs which impose a cap on damages. Carter v. United States, 982 F.2d 1141 (7th Cir. 1992); Lozada v. United States, 974 F.2d 986 (8th Cir. 1992); Owen v. United States, 935 F.2d 734 (5th Cir. 1991), cert. denied, 112 S. Ct. 870 (1992); Starns v. United States, 923 F.2d 34, 37 (4th Cir. 1991), cert. denied, 112 S. Ct. 54 (1991); Taylor v. United States, 821 F.2d 1428 (9th Cir. 1987), cert. denied, 485 U.S. 992 (1988); Lucas v. United States, 807 F.2d 414, 417 (5th Cir. 1986). These are the cases relied upon by the government below and distinguished by the Tenth Circuit in its Order and Judgment. Appendix at 7pa.

As the Tenth Circuit noted, any adjustment to state law as applied to the government under the FTCA must leave both the victim and the government in essentially the same position as if the government were a private party:

> [I]n all of the above-cited cases the effect of the statutory scheme placed the tort victim in exactly the same position that would have resulted had the victim been injured by any other similarly-situated private party. Furthermore, the government, as tortfeasor, was treated in a precisely analogous fashion to a similarly-situated private tortfeasor.

Id. As the Tenth Circuit observed, this case authority does not support the creation of a "rough equivalent" where the

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to pay the present value of the future damages awarded to Tasha Hill, although this result was reached by stipulation rather than by the more circuitous procedural requirements of the statute.

government is ineligible for the precise remedy provided by state law. Id.

In ruling, however, the Tenth Circuit seriously misapplied the controlling law to the facts of this case. Believing that the government is "ineligible" for the remedies of the HCAA, the Tenth Circuit elected to impose a reversionary interest, representing the reversion to "approximate the result contemplated by the HCAA." Appendix at 7pa-8pa. The court erred both in believing that the HCAA requires defendants to make ongoing payments and is therefore inapplicable to the government, as discussed above, and in suggesting that the imposition of a reversionary interest for the benefit of the government provides treatment comparable to that offered to private defendants under the statute. The imposition of a reverter for the benefit of the government both reduces the value of the damage award to the injured plaintiff and provides a benefit to the government not available to private tortfeasors. Thus, the reversionary interest created by the Tenth Circuit fails both of the tests which the case law mandates.

The preferntial treatment enjoyed by the government is also reflected by the fact that the government avoided the application of certain disadvantageous provisions of the statute while enjoying the benefits of other provisions. On the basis of the parties' stipulation at trial, Petitioners did not offer evidence of Tasha Hill's damages in the form required by the HCAA. In fact, Petitioners' Exhibit 185-A, which was not introduced in light of the stipulation, would have supported a higher level of damages than that awarded under

a traditional present-value analysis.[5] Further, in reliance on the parties' stipulation that the HCAA would not be applied, Petitioners did not ask the trial court to order that periodic payments would continue for an initial term of years notwithstanding Tasha Hill's premature death, as allowed by the HCAA. C.R.S. § 13-64-206(2).

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[5] The calculation of future damages in HCAA actions is different from the calculation of such damages in other tort actions due to the statute's requirement that the judgment be for future periodic payments that are "fixed and determinable as to amount...." C.R.S. § 13-64-205(1)(d) and C.R.S. § 13-64-206(1)(a). The amounts of all future payments are fixed, but the costs of care are not. If, in fixing the amount of future payments, the finder of fact assumes a rate of inflation that is too low, then the plaintiff will be caught short in future years. For example, if the finder of fact employs a rate of inflation of five percent, but personal care or medical care expenses inflate at an annual rate of eight percent over a period of ten years, then the periodic payments established in the judgment will be inadequate to cover the plaintiff's expenses. In non-HCAA cases, where the plaintiff receives a lump sum payment, that money can be invested and will earn interest at rates that will keep pace with inflation.

In order to address this problem in this case, plaintiffs proposed that the trial court, in calculating damages pursuant to the HCAA, employ rates of inflation higher than the rates employed by the plaintiffs' expert in calculating the present value based upon a "net discount rate." See Hull, 971 F.2d at 1511. For example, in calculating the net discount rate for future personal care, plaintiffs' economist assumed an inflation rate of 5%. For purposes of calculating the future periodic payments under the HCAA, however, plaintiffs' economist recommended that the rate of inflation be assumed to be 5.7%. Over the course of seventy-four years, that .7% difference in the rate of inflation is extremely significant. The use of a higher rate of inflation will, of course, result in higher estimated personal care costs and higher periodic payments in later years, resulting in a higher present value of the future periodic payments. In this matter, though, the government avoided this higher calculation by virtue of the stipulation, which the government, having already enjoyed the benefits, would now disavow.

None of the circuit court opinions cited above considered circumstances like those presented here, where the government expressly opted out of a statutory program for purposes of determining the amount of damages, but later claimed the protection of the statute for purposes of determining the method of payment. No private provider is entitled to unilaterally pick and choose among the parts of the statute to which it will be subject. Because the government opted to avoid the provisions of the HCAA regarding the calculation and payment of damages, and because the plaintiffs relied on that stipulation, the government is not entitled to now claim for itself supposedly analogous benefits of other provisions of the HCAA.

In creating a reversionary interest in the Tasha R. Hill Trust for the benefit of the government, the Tenth Circuit granted to the government a benefit not provided for in the HCAA and not available to any private provider defending a claim under the statute. Further, the government was awarded this benefit after having avoided other burdens imposed by the same statute. For these reasons, the Tenth Circuit erred and this Court should grant certiorari to reaffirm that the FTCA does not permit the government to enjoy more favorable treatment than private parties in like circumstances.

II. THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE DEPARTURE FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS WHERE THE COURT OF APPEALS FAILED TO APPLY OR MISAPPLIED THE ABUSE OF DISCRETION STANDARD IN REVIEWING THE TRIAL

COURT'S FACTUAL FINDING REGARDING THE PARTIES' STIPULATION.

Review on a writ of certiorari is appropriate where a United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power. In this case, the sole basis for the Tenth Circuit's reversal of the trial court is the trial court's failure to create a reversionary interest for the benefit of the government pursuant to state statute, the Colorado Health Care Availability Act. In so ruling, however, the Tenth Circuit does not even mention the central fact that should have disposed of the appeal: the trial court expressly found that the government had stipulated that the statute should not be applied in this case. Although this finding should have been reversed only for an abuse of discretion, the Tenth Circuit reversed here without any discussion of this issue.

As set out in detail in the statement of facts, counsel and the trial court engaged in a lengthy discussion regarding the applicability of the Colorado Health Care Availability Act to this matter. Petitioners and the trial court believed that the HCAA could be applied consistently with the FTCA's requirement that the government could be liable only for damages payable in a lump sum. The government took the position that the HCAA was inconsistent with this requirement of the FTCA. In open court, the parties entered into a stipulation, expressly approved by the court, that the HCAA would not be applied in this matter. Appendix at 86pa-91pa.

In the course of the same discussion in open court that led to the stipulation, the government expressly indicated

that it intended to request creation of a reversionary interest in any damage award based upon the rule of law announced by the Tenth Circuit in Hull v. United States, 971 F.2d 1499 (10th Cir. 1992). Appendix at 91pa-93pa.[6] Prior to the entry of judgment in this matter, the government did not suggest in any way that it would argue for creation of such a reversionary interest pursuant to the HCAA.

Six weeks after trial, during a conference scheduled by the trial court to consider creation of a trust to protect the interests of the minor plaintiff, Tasha Hill, the government first suggested that imposition of reversionary interest on behalf of the government was appropriate under the HCAA. The trial court immediately replied that the government had stipulated that the HCAA would not be applied to this action.

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[6] In Hull, another FTCA action, the Tenth Circuit ruled that it is within a trial court's discretionary authority to create a reversionary trust for management of the award of damages to an incompetent plaintiff where it is in the interest of the plaintiff. In the circumstances presented in Hull, the trial court apparently feared that the life of the minor plaintiff might be in jeopardy if the parents stood to inherit the sizeable award of damages upon the child's death. The Tenth Circuit emphasized in Hull that the only factor that guided the court's discretion in creating such a reversionary interest, however, was the best interest of the plaintiff. 971 F.2d at 1505. The interests of the government and the parents were not to be considered. In the present matter, the trial court specifically found that Tasha Hill's parents had provided exemplary and selfless care and that there was "not a shred of evidence" that suggested that a reversionary interest for the benefit of the government was in Tasha's interest. 864 F. Supp. at 1032, Appendix at 21pa. Both the trial court and the Tenth Circuit denied the government's request to create a reversion pursuant to Hull. 864 F. Supp. at 1032-33, Appendix at 16pa-23pa; 1966 WL 162421, at *3, Appendix at 9pa. Apparently recognizing that it did not have a good argument for creation of a reversion under Hull, the government changed legal theories shortly after trial and began to push for creation of a reversion under the HCAA.

Appendix at 102pa-103pa. The trial court later entered a specific finding that the government had unambiguously stipulated that the HCAA would not be applied in this matter. 864 F. Supp. at 1033, Appendix at 22pa-23pa.

Prior to its opinion in this case, the Tenth Circuit had announced clear rules of law regarding stipulations:

> A stipulation is an admission which "cannot be disregarded or set aside at will." Stipulations are not absolute, however, and may be withdrawn whenever necessary to prevent manifest injustice. District courts consequently are vested with broad discretion in determining whether to hold a party to a stipulation or whether the interests of justice require that the stipulation be set aside.

Wheeler v. John Deere Co., 935 F.2d 1090, 1097-1098 (10th Cir. 1991) (citations omitted).

The Tenth Circuit had specifically enforced stipulations to the effect that controlling authority, whether statutory or case law, would not apply to the matter in question. Mills v. State Farm Mut. Auto. Ins. Co., 827 F.2d 1418, 1422 (10th Cir. 1987); L.P.S. v. Lamm, 708 F.2d 537, 540 (10th Cir. 1983); Lyles v. American Hoist & Derrick Co., 614 F.2d 691, 694 (10th Cir. 1980). It is also worthy of note that the parties' stipulation in this case that the HCAA would not be applied is consistent with a provision of that statute that expressly authorizes litigants to agree to limit the application of the statute by settlement or consent judgment. C.R.S. § 13-64-211.

The Tenth Circuit had stated on numerous occasions that rulings of a trial court which are in accordance with the parties' stipulations will not be considered erroneous on

appeal. Mills v. State Farm Mut. Auto. Ins. Co., supra, at 1422; L.P.S. v. Lamm, supra, at 540; Lyles v. American Hoist and Derrick Co., supra, at 694; United States v. Northern Colorado Cons. Dist., 608 F.2d 422, 430-431 (10th Cir. 1979).

Finally, the Tenth Circuit has indicated that, because the trial court has broad discretion in determining whether or not to hold a party to its stipulation, the appropriate standard of review by the appellate court is for abuse of that discretion. Wheeler v. John Deere Co., supra.

In light of the clarity of Tenth Circuit law regarding stipulations, Petitioners' brief to the Tenth Circuit devoted more space to a discussion of the stipulation and pertinent law than to any other issue. Notwithstanding the specificity of the trial court's rulings regarding the stipulation by the parties that the HCAA would not be applied to this matter, notwithstanding the clear rules of law regarding the propriety and enforceability of stipulations in the Tenth Circuit, and notwithstanding Petitioners' lengthy argument on this issue, the Tenth Circuit's Order and Judgment in this matter does not even refer to the stipulation or to the trial court's decision to hold the government to the stipulation.

Controlling precedent establishes that the trial court's actions in approving the stipulation, in construing the scope of the stipulation, and in refusing to allow the government to renege on the stipulation are within the trial court's discretion. The Tenth Circuit's failure to even mention the stipulation in its Order and judgment compels the conclusion that the Court of Appeals did not determine that the trial court had abused its discretion. Petitioners respectfully submit that the Tenth Circuit's reversal without consideration of the stipulation and without finding an abuse of discretion

demonstrates that the Court of Appeals did not apply the proper standard of review, constituting a departure from the accepted and usual course of judicial proceedings that warrants this Court's review on a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 6th day of May, 1996.

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Robert E. HILL, individually and as parent and next friend of Tasha R. Hill, a minor; Cynthia G. Hill, individually, and as parent and next friend of Tasha R. Hill, a minor,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

Nos. 94-1434, 94-1594.

United States Court of Appeals, Tenth Circuit.

Feb. 5, 1996.

Parents brought action under Federal Tort Claims Act (FTCA) on behalf of child who suffered severe injuries as result of negligence in her treatment at Army medical facility. The United States District Court for the District of Colorado, Lewis T. Babcock, J., awarded economic damages of $10,019,800 and damages to parents for past care of child of $1,017,500, 854 F.Supp. 727, and denied government's request for reversionary interest in trust created for child, 864 F.Supp. 1030. Government appealed, and the Court of Appeals, McKay, Circuit Judge, held that: (1) parents were entitled to recover for costs of past care they had provided during four-year period during which they could not afford professional help, and (2) trust under which government had reversionary interest in award of

$10,019,800 for life care costs, less amount which was for home modification, would best approximate scheme of Colorado Health Care Availability Act (HCAA).

Affirmed in part and reversed and remanded in part.

[1] DAMAGES k135
115k135

Award of $1,017,500 to parents of child, who had been seriously injured as result of government's negligence at Army medical facility, in action under Federal Tort Claims Act (FTCA), for services rendered by parents in providing 24-hour nursing care over previous four years during which they were unable to afford professional care was proper where court determined that care provided by parents was equivalent both in kind and quality to care that would have been rendered by licensed practical nurse (LPN), even though government contended that parents had provided largely unskilled parental care and should not be compensated for level of care they did not provide.

[2] UNITED STATES k142
393k142

Where there is specific cap on tort liability under state law, United States government may benefit from this limit although it did not otherwise participate in statutory scheme which provides cap.

[3] UNITED STATES k144
393k144

Reversionary trust could be created which would approximate result contemplated by Colorado Health Care Availability Act (HCAA) with respect to damage award to child who was severely injured as result of negligence of government at Army hospital and who recovered in action under Federal Tort Claims Act (FTCA) by allowing government to have reversionary interest in award of $10,019,800 for life care costs, less amount which was for home modification; trust would prevent award for future medical expenses from accruing to child's heirs upon her death if child lived shorter than expected period, but allow receipt of entire home modification amount, which was not for future damages. West's C.R.S.A. §§ 13-64-201 to 13-64-212.

[4] UNITED STATES k144
393k144
While district court has inherent power to create reversionary trust for benefit of infant in action under Federal Tort Claims Act (FTCA), it may only do so if it is in best interests of child, and burden must be on party proposing such a plan to demonstrate that it would be in the best interests of child.

Appeal from the United States District Court for the District of Colorado (D.C. No. 90-B-1071); Lewis T. Babcock, Judge. William G. Cole (Robert S. Greenspan, with him, on the briefs), Appellate Staff, Civil Division, Department of Justice, Washington, D. C., for Defendant-Appellant. Shelley B. Don (David L. Hiller, with him, on the brief) of Don, Hiller & Galleher, P.C., Denver, Colorado, for Plaintiffs-Appellees.

Before ANDERSON and McKAY, Circuit Judges, and COOK, [FN*] Senior District Judge.

McKAY, Circuit Judge.

The United States appeals certain aspects of a judgment entered against it in this Federal Tort Claims action. We have jurisdiction under 28 U.S.C. § 1291. This case was brought on behalf of Tasha Hill, a minor, by her parents. Tasha was seriously injured as a result of the government's negligence at an Army medical facility in Colorado. The government conceded liability and the district court awarded substantial damages to Tasha and her parents, with the damages awarded to Tasha to be placed in a trust for Tasha's benefit. The government has raised two issues on appeal. First, the government challenges one aspect of the damage award to Mr. and Mrs. Hill. Second, the government objects to the district court's refusal to grant the United States a reversionary interest in Tasha's trust. We affirm in part and reverse in part.

[1] The district court awarded $1,017,500 to Tasha's parents for services rendered to her over the past few years when they were unable to afford professional medical care. The award was based on the estimated cost of providing twenty-four-hour nursing care, and the government does not challenge the cost estimate for such care. Rather, the government claims that the parents were merely providing largely unskilled parental care and should not be compensated for a level of care that they did not provide. The district court found that the Hills' care was equivalent both in kind and quality to the care that would have been rendered by a Licensed Practical Nurse. The government

has not demonstrated that this finding was clearly erroneous. We therefore affirm.

The government has also urged that the district court erred in failing to place the award to pay for Tasha's future damages in a reversionary trust.

[FN1] Tasha's award is based on a projected life expectancy of a normal healthy girl of her age. However, there remains a possibility that she may die prematurely, or that, for other reasons, there may be funds remaining in her trust when she dies. The government argues that Tasha's heirs would be unjustly enriched if these funds become part of her estate. Since the funds are intended to fully compensate Tasha for her medical costs and other expenses, it would be a windfall to her heirs if the funds were not fully exhausted. Thus, the government argues that any funds remaining in the trust should revert back to the U.S. Treasury.

The government's legal argument that such an approach is authorized, or indeed required, is two-pronged. In support of its position, the government cites the Colorado Health Care Availability Act, Colo. Rev. Stat. § 13-64-201 to -212 ("HCAA"). Under the HCAA, health care providers who are found liable for medical torts make payments of future damages in the form of periodic payments. These payments are generally funded by the purchase of an annuity. Upon the death of the "judgment creditor" (the tort victim), these payments cease, except for that portion of the payments awarded for loss of future earnings. Id. 13-64-206(3). This provision is designed to provide increased precision in the speculative area of future losses by allowing the payment of

damages as the losses are found to accrue. The HCAA eliminates, to the extent possible, the likelihood that health care providers will pay out large sums of money for losses that will never actually be sustained by the tort victim. Without the periodic payment scheme, were the tort victim to die prematurely, the unspent medical and related damages would accrue to the estate of the victim and thus represent a windfall to the victim's heirs. We note, however, that money damages awarded for loss of future earnings are exempted from this provision and become part of the victim's estate "to be paid to the heirs and devisees of the judgment creditor," id. § 13-64-206(3), just as if the victim had actually earned the wages herself.

The government does not claim that they are specifically subject to the HCAA, and indeed, it is clear that the federal government may not be ordered to make periodic payments in the manner in which the HCAA provides. Hull v. United States, 971 F.2d 1499, 1505 (10th Cir.1992) (quoting Frankel v. Heym, 466 F.2d 1226, 1228-29 (3d Cir.1972)). However, under the FTCA, the government is to be treated "in the same manner and to the same extent as a private individual under like circumstances" depending on the law of the state where the tort occurred. 28 U.S.C. § 2674 (1988). The government interprets this provision as requiring a court to fashion a remedy that will further the intent and approximate the outcome of a statute such as the HCAA--even where, as here, the statute does not itself apply to the government. Thus, if an alternative exists that would promote the purpose of the state statute and yield a practically similar result, such an alternative should be required. The government argues that, in this case, the creation of a reversionary trust would accomplish the same

net result mandated by the HCAA, in that it would ensure full compensation of the victim while preventing unjust enrichment of the victim's heirs.

[2] The government cites several cases to support its argument. See Carter v. United States, 982 F.2d 1141, 1144 (7th Cir.1992); Lozada v. United States, 974 F.2d 986, 987-89 (8th Cir.1992); Owen v. United States, 935 F.2d 734, 737 (5th Cir.), reh'g denied, 943 F.2d 1315 (5th Cir.1991), cert. denied, 502 U.S. 1031 (1992); Starns v. United States, 923 F.2d 34, 37 (4th Cir.), cert. denied, 502 U.S. 809 (1991); Taylor v. United States, 821 F.2d 1428, 1431 (9th Cir.1987), cert. denied, 485 U.S. 992 (1988); Lucas v. United States, 807 F.2d 414, 417 (5th Cir.1986). These cases stand for the proposition that where there is a specific cap on tort liability, the United States government may benefit from this limit although it did not otherwise participate in the statutory scheme which provides the cap. While this proposition is undoubtedly true, in all of the above-cited cases the effect of the statutory scheme placed the tort victim in exactly the same position that would have resulted had the victim been injured by any other similarly-situated private party. Furthermore, the government, as tortfeasor, was treated in a precisely analogous fashion to a similarly-situated private tortfeasor. None of these cases offers direct support for the proposition that the United States may attempt to create a rough equivalent to a state statute when they are clearly ineligible for the precise remedy provided therein. However, even were we to endorse an imprecise equivalent to a state statutory provision in some situations (a question which we do not decide), the government's proposed alternative in this case is not sufficiently analogous to the HCAA to merit

consideration because the government has failed to take into account the differential statutory treatment given to damages for loss of future earnings.

[3] The parties have agreed that Tasha's entire award would be placed in a trust for her care. Under the government's proposal, any funds remaining in Tasha's trust would revert to the U.S. Treasury upon her death. Thus, no funds from the trust would become part of Tasha's estate. As indicated earlier, under the HCAA, the portion of damages awarded for future earnings do become part of the estate upon the victim's death. In this case, over $500,000 of the damage award is for future loss of earning capacity. Under the government's proposed reversionary trust, not only would any unspent medical cost damages be returned, but any portion of Tasha's lifetime lost wages would revert to the government as well. Such a result is clearly not contemplated by the HCAA and would not result in "like treatment under like circumstances" as mandated by the FTCA. Indeed, it would run contrary to the statute because it could potentially result in unjust enrichment of the tortfeasor at the expense of Tasha's legitimate heirs. The government has simply failed to recognize the possible inequitable consequences of its proposal.

Nevertheless, we believe that the district court can create a reversionary trust that would approximate the result contemplated by the HCAA. Under the HCAA, an award for future medical expenses would not accrue to the plaintiff's heirs upon his or her death. Thus, in this case, the government should receive a reversionary interest in that part of Tasha's award which covers future medical expenses. Specifically, the district court awarded Tasha $10,019,800

for life care costs. This award included an amount for home modification. Because the home modification award is not for future damages, it should be subtracted from the life care amount. The remaining amount of the life care award should be placed in a reversionary trust. We remand in order for the district court to create such a trust.

[4] The government also argues that the district court under Hull v. United States has the inherent authority to create a reversionary trust in FTCA cases. See 971 F.2d at 1504-05. As the district court recognized, while it does have the inherent power to create a reversionary trust under Hull, it may only do so if it is "in the best interests of the child." Id. The burden must be on the party proposing such a plan to demonstrate that it would be in the best interests of the child. The government has offered no reasons why a reversionary trust could possibly benefit Tasha, nor can we divine any. Accordingly, the judgment of the district court is AFFIRMED with respect to the award for future loss in earnings capacity, non-economic losses, physical impairment and disfigurement, and the parents' past care of Tasha. The judgment of the district court is REVERSED and REMANDED with respect to the life care award (excluding home modification costs).

FN* Honorable H. Dale Cook, Senior United States District Judge for the Northern District of Oklahoma, sitting by designation.

FN1. Appellees argue that the government waived this issue by failing to raise it before the district court. While the government's counsel did not clearly present the issue, we hold that under the circumstances of the case, it was

sufficiently presented to the district court to warrant our review.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT E. HILL, individually and as parent and next friend of Tasha R. Hill, a minor; CYNTHIA G. HILL, individually, and as parent and next friend of Tasha R. Hill, a minor,

Plaintiffs - Appellees,

v.

UNITED STATES OF AMERICA,

Defendant - Appellant.

ORDER

Filed March 10, 1995

Before MOORE, ANDERSON, KELLY, Circuit Judges.

Appellant's motion for partial summary affirmance is granted. The judgment of the district court as to (1) the award of future loss of earning capacity in the amount of $508,600, (2) the award of $500,000 in non-economic damages and (3) the award of $2,500,000 for physical

impairment or disfigurement is affirmed. This court retains jurisdiction as to all other issues.

A partial mandate shall issue forthwith.

Entered for the Court

PATRICK FISHER, Clerk
By /s/
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 90-B-1071

ROBERT E. HILL, individually, and as parent and next friend of Tasha R. Hill, a minor; and CYNTHIA G. HILL, individually, and as parent and next friend of Tasha R. Hill, a minor,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant

ORDER

This case is before me now on the "Plaintiffs' Motion for Approval of Revised Order and Trust Agreement For The Benefit of Tasha R. Hill." Hearing on the terms of the plaintiffs' proposed trust was held this 27th day of October, 1994. I have reviewed the proposed trust agreement, in light of my Findings of Fact, Conclusions of Law and Order, dated June 8, 1994, as amended on July 14, 1994, and in light of my Memorandum Opinion and Order entered October 12, 1994, addressing the question of reverter to the defendant reserved in the order of June 8, 1994, together with the general acceptability of the plaintiffs' tendered trust

made the subject of the October 12, 1994 Memorandum Opinion and Order.

I conclude that the now revised proposed order and trust agreement are in the best interest of the plaintiff, Tasha R. Hill.

I further conclude that final judgment should now enter upon the Findings of Fact, Conclusions of Law and Order dated June 8, 1994, as amended on July 14, 1994, and supplemented by Memorandum Opinion and Order of October 12, 1994.

Finally, it is apparent that pending ultimate finality on appeal, the trust approved hereby will not be funded. I am advised by the plaintiff at today's hearing that plaintiff, Robert E. Hill's employment with the United States Army may terminate in the near future. As is manifest in my June 8, 1994 Findings of Fact, Conclusions of La and Order, as amended July 14, 1994, and supplemented finally in the Memorandum Opinion and Order of October 12, 1994, plaintiff Tasha Hills' injuries are catastrophic in the extreme. It is clear that expeditious resolution of this case is absolutely requisite for the insurance of her daily and future health and well being. For every day that passes when her needs are short changed the quality of her life is unalterably diminished and lost. Consequently, under the circumstances of this case, I recommend strongly that the Tenth Circuit Court of Appeals expedite, in every way possible, the resolution of this case on appeal.

IT IS THEREFORE ORDERED as follows:

1. The revised order and trust agreement for the benefit of Tasha R. Hill is hereby approved and made an order of this court in the form and substance attached hereto.

2. Final judgment shall enter in favor of plaintiffs and against the defendant in accordance with this court's Findings of Fact, Conclusions of Law and Order entered June 8, 1994, as amended on July 14, 1994, and further supplemented by the Memorandum Opinion and Order entered October 12, 1994.

This court respectfully RECOMMENDS that the Tenth Circuit Court of Appeals expedite resolution of the appeal of this case.

BY THE COURT:

/s/
Lewis T. Babcock, Judge

Dated: October 24, 1994

Robert E. HILL, individually and as parent and next friend of Tasha R. Hill, a minor; and Cynthia G. Hill, individually, and as parent and next friend of Tasha R. Hill, a minor, Plaintiffs,

v.

UNITED STATES of America, Defendant.
Civ. A. No. 90-B-1071.
United States District Court,
D. Colorado.
Oct. 12, 1994.

Government sought reversionary interest in trust created for injured child upon completion of Federal Tort Claims Act case. The District Court, Babcock, J., held that: (1) granting government reversionary interest was not shown to have been in child's best interest, and (2) government as tort-feasor did not have right to object to proposed trust terms.
Granted in part and denied in part.

[1] UNITED STATES k144
393k144
Federal district court had inherent authority to create trust which includes reversionary interest in suit under Federal Tort Claims Act, if reverter is in best interest of injured child.

[2] UNITED STATES k144
393k144

Possibility that injured child's award in Federal Tort Claims Act may revert to either parents or government is irrelevant when deciding whether to include reversionary interest in trust established with proceeds of suit.

[3] UNITED STATES k144
393k144
Party seeking reversionary clause in trust established with proceeds of Federal Tort Claims Act suit bears burden of showing that clause would serve best interests of injured child.

[4] UNITED STATES k144
393k144
Government was not entitled to reversionary interest in trust created with proceeds of Federal Tort Claims Act suit brought on behalf of injured child given exemplary care provided to child by parents and failsafe provisions of trust which would apply if care deteriorated, and together with evidence that child had life expectancy of nearly 74 more years.

[5] UNITED STATES k144
393k144
Government, as tort-feasor, had no interest in terms of trust created from proceeds recovered in Federal Tort Claims Act suit; tort-feasor's obligation and rights cease when damages are paid.

[6] TRUSTS k159
390k159

Plaintiffs' lead counsel was qualified to serve as trustee of trust created for benefit of injured child following completion of Federal Tort Claims Act case given that counsel had known child and parents for years, parents had confidence in counsel, counsel had served as trustee of other trust estates, and counsel would not have any interest in trust estate.

[7] INFANTS k27
211k27
Trustee of trust created for injured child upon completion of Federal Tort Claims Act litigation was properly charged with duty to assure that child received medical, therapeutic, and rehabilitative services necessary and appropriate for her physical and emotional well-being.

[7] TRUSTS k270
390k270
Trustee of trust created for injured child upon completion of Federal Tort Claims Act litigation was properly charged with duty to assure that child received medical, therapeutic, and rehabilitative services necessary and appropriate for her physical and emotional well-being.

*1031 Shelly B. Don, David L. Hiller, Watson W. Galleher, Don, Hiller & Galleher, P.C., Denver, CO, for plaintiffs.

John Moran, U.S. Army Litigation Div. Tort Branch (Moran), Arlington, VA, Roger D. Einerson, Assistant Director, Torts Branch, Civ. Div., U.S. Dept. of Justice, Washington, DC, Stephen D. Taylor, Asst. U.S. Atty., Denver, CO, for defendant.

MEMORANDUM OPINION AND ORDER

BABCOCK, District Judge.

This is a case under the Federal Tort Claims Act in which the government admitted liability for the negligent treatment of infant, Tasha Hill at the Evans Army Hospital in October 1988. After trial to the court on the issue of damages, on July 14, 1994, I ordered that judgment enter in favor of Robert E. Hill and Cynthia Hill as parents and next friends of Tasha R. Hill against the government in the amount of $13,528,400. Hill v. United States, 854 F.Supp. 727, 734-35 (D.Colo.1994). All parties agree that it is appropriate for the money to be placed in a trust for the benefit of Tasha. The key issue remaining is whether the trust should contain a reversionary clause in favor of the government. Resolution of this issue is central to the trust's terms and structure. The question is fully briefed. Oral argument will not assist its resolution.

I have considered the parties' proposed trust instruments and their respective objections. Frankly, I am at a loss to understand the entire tenor of the government's objections to the plaintiffs' proposed trust especially in light of the tragic effect of the government's admittedly negligent care of Tasha. The government requests that I include *1032 in the proposed trust a reversionary clause on its behalf. The government also objects to Shelley B. Don, plaintiffs' competent and ethical lead counsel, being named as trustee. In addition, the government proposes its own form of trust. I find the government's objections and proposed trust, each in its own way, to be wholly unacceptable. I further find plaintiffs' proposed trust to be acceptable and that Mr. Don is qualified to serve as trustee. Under the facts of this case,

I decline to add to the trust a reversionary clause in favor of the government.

Reversionary Clause [1][2][3] Under Hull v. United States, 971 F.2d 1499 (10th Cir.1992), I have the inherent authority to create a trust which includes a reversionary interest if the reverter is in the best interest of the injured party. Id. at 1505. "[T]he court has [the] power (1) to ensure that the recovery benefits the victim, and (2) to exercise strict supervision over investment and use of the funds if the victim is a legal incompetent or otherwise in need of protection." Hull at 1505, quoting Reilly v. United States, 863 F.2d 149, 170 (1st Cir.1988). The only inquiry is "[h]ow should [the trust] best be structured to benefit [the victim]?" Hull at 1505. The possibility that the parents might succeed to the injured child's award is not relevant. Neither is the possibility of a reverter to the government relevant. Hull at 1505. Under Hull, the imposition of a reversionary clause is the exception, not the rule. Also, the party seeking the reversionary clause, in this case the government, bears the burden of showing that the clause would serve the best interests of the injured child. See Hull, 971 F.2d at 1505; trial transcript, July 13, 1994 p. 21, ll. 11-15.

[4] Despite demonstrating its understanding of Hull in its brief, the government complains that the Hills "provided no facts or arguments demonstrating that a reversionary interest in the United States would be against Tasha's interest." (Defendant's objections to plaintiffs' proposed trust p 4) (emphasis in original). Contrary to the government's distortion of Hull, it is their burden to persuade me that the

reversionary clause is in Tasha's best interests. The government has failed utterly in this task. The sole and undisputed evidence is that Tasha's parents have provided exemplary care for their daughter from the moment of her injuries. The Hills are obviously devoted to their daughter. I have no reason to believe anything but that their selfless, meticulous care will continue for as long as they are able to care for her. In Hull, the government, the guardian ad litem, and the trial court all expressed concern about the child's safety if a reversionary clause were not part of the trust. In this case, in contrast, there is not a shred of evidence that Tasha is at any risk which would necessitate a reversionary trust.

The government also argues that I should order a reverter in the trust because it is "pure speculation to assume that Tasha's parents or a legal guardian other than Tasha's parents will only have her interests at heart." (Defendant's objections to plaintiffs' proposed trust p. 4). This argument itself is speculative and disingenuous. As I said, the quality of care given to Tasha by her parents has been outstanding from the inception of their terrible ordeal and there is not a scintilla of evidence that they will in any way act contrary to her best interests. In the unlikely event that the quality of Tasha's care were to deteriorate, the proposed trust provides several "failsafe" provisions to guard against such an event. (Plaintiffs' proposed trust, P 6(c)(1); P 6(c)(2); P 8; P 9(c)).

It might be appropriate to order a reversionary trust "where there is great uncertainty about the victim's life expectancy...." Nemmers v. United States, 795 F.2d 628,

636 fn. 4 (7th Cir.1986). In this case, however, based on persuasive expert testimony at trial, I entered findings of fact that "Tasha has a normal life expectancy of an additional 73.92 years ... [which is] clearly tied to the quality of her care." Hill v. United States, 854
F.Supp. at 729.

The government distorts the record when, in its brief, it attempts to displace my findings by proffering a contradictory opinion from a witness who did not testify at the trial. Moreover, although the term of life may generally be said to be metaphysical, it is specious to argue that Tasha's life expectancy *1033 is uncertain in the discrete context of the record here. Her life expectancy is "clearly tied to the quality of her care." Id. It is logical to assume that the state of health of one who is as profoundly physically damaged as Tasha, is intrinsically linked to the quality of care given to her. Simply put, the better the quality of care Tasha receives, the longer she will live. The government also argues that I should order a reversionary trust pursuant to the Colorado Health Care Availability Act, C.R.S. 13-64-201, et. seq. (Def.Opp. p 9). The government ignores the express stipulation it entered into during trial that the Health Care Availability Act does not apply to this matter. (trial transcript, May 24, 1994 p. 762-65). As I stated during the trial, and the government agreed, "[t]he circuit has told me in essence to disregard the public policy expressed in the statute. And we have agreed by express stipulation that this case, a federal case, isn't going to be governed in any way by this statute." (trial transcript, July 13, 1994, p. 25) (emphasis added). The government remains bound by its unambiguous stipulation which was

made on the record in open court and accepted by the court. Mills v. State Farm Mutual Automobile Ins. Co., 827 F.2d 1418, 1422 (10th Cir.1987). The government's penurious motivation is manifest. I will not allow the government to renege on the stipulation to gain a benefit for itself. Under the facts of this case, I conclude that the government has failed to show that a reversionary clause is in Tasha Hill's best interest. Rather, contrary to Hull's clear teaching, the government as tortfeasor here, advocates a reverter to further its own, not Tasha's, interests. Finally, even if the government did not bear the burden upon the reverter question, the record fully supports the conclusion that the Hills have independently shown why a reversionary clause is unwarranted in this case.

Government's Objections to Plaintiffs' Proposed Trust

[5] The government also objects to several terms of plaintiffs' proposed trust. However, the government sorely misconstrues its role. If there is any lingering doubt about the source of Tasha's catastrophic injuries, let me lay them to rest. The United States government, through its agents, caused Tasha's injuries. The funds which will make up the trust may come from the government, but the government is not, as it euphemistically calls itself, the "grantor." (defendant's proposed trust agreement p. 1). The government is the tortfeasor. I decided the damage amounts in light of "justice and equity both to the Government and to the claimants." Hull at 1505. (quoting Report of the Joint Committee on the Organization of Congress). "[A]fter the wrongdoer and its funds have been parted, the focus shifts...." Id. The tortfeasor's obligation to the victim

ceases when it pays the damages to fund the trust. Id. The tortfeasor's right to have a say in the specifics of the trust ceases also, especially when, as here, there is no reverter clause in the trust. For this reason, the government's objections to the details of the proposed trust are out of order. Even if considered, however, these objections are without merit.

Nature and Terms of Plaintiffs' Proposed Trust Purpose of the Trust

The purpose of the trust is "to provide for the personal, medical, therapeutic, cognitive, psychological and rehabilitative care of Tasha R. Hill in order to maximize her mental development and minimize her physical disabilities to the fullest extent possible, so as to maximize her enjoyment of life and to extend her life." (plaintiffs' proposed trust P 4a). This is absolutely correct.

Independent Trustee

The plaintiffs have requested that Shelley B. Don, lead counsel in this litigation, serve as trustee of Tasha's trust. (plaintiffs' reply p. 17). Again, I agree.

[6] Under the trust terms, the trustee is responsible for oversight and coordination of all of Tasha's needs which will necessarily require extensive, ongoing communications between the trustee and Tasha's parents. Mr. Don has known Tasha and her parents for years. The parents obviously have deep *1034 confidence in Mr. Don based on their long, close relationship with him. Mr. Don has served

as trustee of other substantial trust estates. Id. at 18. Under the terms of the trust, Mr. Don would not have any interest in the trust estate. Moreover, the trustee will be required to post a $10,000,000 bond. Under these circumstances, I conclude that Mr. Don is qualified to serve as trustee.

Responsibilities and Duties of the Trustee

[7] Under the trust terms, the trustee has the duty to assure that Tasha receives the medical, therapeutic, and rehabilitative services which are necessary and appropriate for her physical and emotional well-being. (plaintiffs' proposed trust P 6c). The trustee's powers as outlined in the trust grant the trustee the flexibility necessary to carry out his duties. As a fiduciary, the trustee is expected to make decisions that at all times advance Tasha's best interests. All of the trustee's decisions are subject to review by the trust auditor and, ultimately, this court.

I conclude that the terms of the plaintiff's proposed trust are proper and necessary to further the best interests of Tasha Hill. Accordingly, it is ordered that

1. plaintiffs' motion for a court-ordered trust for the benefit of Tasha Hill
is GRANTED;

2. the government's motion for a proposed reversionary trust is DENIED;

3. a hearing will be held at 9:00 a.m. October 27, 1994, at which the terms of the trust agreement, including

designation of the trustee and trust auditor, will be finalized.

Robert E. HILL, individually and as parent and next friend of Tasha R. Hill, a minor; and Cynthia G. Hill, individually, and as parent and next friend of Tasha R. Hill, a minor, Plaintiffs,

v.

UNITED STATES of America, Defendant.
No. 90-B-1071.
United States District Court, D. Colorado.
June 8, 1994.

Child who sustained permanent brain damage and catastrophic injury as result of negligent treatment at United States hospital sued government under Federal Tort Claims Act (FTCA). Child's parents also sued government. The District Court, Babcock, J., held that: (1) child was entitled to recover economic damages of $10,019,800; (2) parents were entitled to recover $1,017,500 for child's past care; and (3) parents could not recover for loss of child's society and companionship.

So ordered.

See also 751 F.Supp. 909.

[1] UNITED STATES k142
393k142

Child who sustained permanent brain damage and catastrophic injury as result of government's negligent treatment was entitled under Federal Tort Claims Act

(FTCA) to $10,019,800 in economic damages (life care), $508,600 for future loss of earning capacity, $500,000 in noneconomic damages, and $2,500,000 for physical impairment and disfigurement. 28 U.S.C.A. ss 1346, 2671 et seq.

[2] UNITED STATES k142
393k142

Compensation under Federal Tort Claims Act (FTCA) for care of child who sustained permanent brain damage and catastrophic injury as result of negligent treatment at Army hospital was awarded on 24-hour per day basis, whether performed by nurse's aide or by parents. 28 U.S.C.A. ss 1346, 2671 et seq.

[3] UNITED STATES k142
393k142

Under Federal Tort Claims Act, child who sustained permanent brain damage and catastrophic injury as result of negligent treatment at government hospital was entitled to recover damages to pay for expenses of psychological counseling to assist her family in coping with her severe impairments. 28 U.S.C.A. ss 1346, 2671 et seq.

[4] UNITED STATES k142
393k142

Damages for travel and transportation expenses that child who suffered permanent brain damage and catastrophic injury would incur due to her physical impairments would

not be based on cost of modified van, but rather, would be difference in cost between car and van, plus costs of modifying van; child or her family would have incurred average cost of car throughout her life in any event. 28 U.S.C.A. ss 1346, 2671 et seq.

[5] UNITED STATES k142
393k142

Damages of $42,300 would be awarded to child who sustained permanent brain damage and catastrophic injury at government hospital due to government's negligence, to reflect cost of modifications to her family's home to accommodate her special equipment and needs; that figure was average of estimates submitted by both parties, as both experts conceded that it was difficult cost to determine, and court was unable to determine which estimate
was most accurate. 28 U.S.C.A. ss 1346, 2671 et seq.

[6] UNITED STATES k142
393k142

Under Federal Tort Claims Act, child who sustained permanent brain damage and catastrophic injury as result of negligent treatment at government hospital was entitled to recover $500,000 for noneconomic losses; even though Colorado law
generally limits recovery of noneconomic damages to $250,000 per party, court has discretion to increase that amount to $500,000, and child had suffered enormous pain and suffering and manifest loss of enjoyment of life. West's C.R.S.A. s 13-21-102.5(3)(a); 28 U.S.C.A. ss 1346, 2671 et seq.

[7] DAMAGES k32
115k32

In addition to economic and noneconomic damages, injured plaintiff in Colorado is entitled to recover damages for physical impairment and disfigurement.

[7] DAMAGES k54
115k54

In addition to economic and noneconomic damages, injured plaintiff in Colorado is entitled to recover damages for physical impairment and disfigurement.

[8] UNITED STATES k144
393k144

District court has inherent authority to structure damage awards or to impose trusts or reverter conditions to safeguard best interests of Federal Tort Claims Act (FTCA) plaintiff. 28 U.S.C.A. ss 1346, 2671 et seq.

[9] UNITED STATES k142
393k142

Parents of child who sustained permanent brain damage and catastrophic injury due to negligent treatment at government hospital were entitled to recover $1,017,500 for past care of child during previous five and one-half year period. 28 U.S.C.A. ss 1346, 2671 et seq.

[10] UNITED STATES k78(9)

393k78(9)

Under Federal Tort Claims Act, misrepresentation exception to government's waiver of immunity is inapplicable in medical malpractice cases; government is immune, however, to extent such claim seeks relief for economic losses. 28 U.S.C.A. s 2680(h).

[11] UNITED STATES k142
393k142

Although parents of child who sustained permanent brain damage and catastrophic injury as result of negligent treatment at government hospital established that hospital staff was negligent in misrepresenting to parents that hospital had
facilities and experienced staff necessary for proper care of infantile meningitis, parents failed to establish, by preponderance of evidence, their alleged damages proximately resulting from physical injury; while both parents testified generally that they were experiencing some back pain caused by excessive lifting of child, that testimony was uncorroborated by any medical testimony. 28 U.S.C.A. s 2680(h).

[12] PARENT AND CHILD k7(1)
285k7(1)

Colorado law does not allow claim by parent against third party for loss of society and companionship of child due to injuries to child caused by wrongful conduct of that third party.

*729 Shelley B. Don, David L. Hiller, Watson W. Galleher, Don, Hiller & Galleher, P.C., Denver, CO, for plaintiffs.

John Moran, U.S. Army Litigation Div., Arlington, VA, Stephen D. Taylor, Asst. U.S. Atty., Denver, CO, for defendant.

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BABCOCK, District Judge.

This is a case under the Federal Tort Claims Act concerning the government's now admitted negligent treatment of an infant, Tasha Hill, at the Evans Army Community Hospital (EACH) in October 1988. Tasha was four and one-half months old when she was brought by her parents, Cynthia and Robert Hill (referred to jointly as the parents), to the outpatient clinic at EACH, located at Fort Carson, Colorado, on the morning of October 17, 1988. She was diagnosed and treated for infantile spinal meningitis. As a result of her negligent care, she sustained permanent brain damage and catastrophic injury.

The negligence alleged included: failure to perform a prompt assessment of Tasha upon her arrival at the clinic; delay in the initial administration of antibiotics; the absence of appropriate supervision by an attending physician; inadequate, incomplete, inconsistent and unreliable medical records; and failure to recognize and treat Tasha's complications of her meningitis. The government vigorously

contested negligence and causation throughout this case until the third day of trial when it admitted that the agents or employees of the United States were negligent and that their negligence was a proximate cause of injury to Tasha Hill. At that point, the trial proceeded on the issue of Tasha's damages and her parent's independent claims of liability and damage.

I. TASHA'S DAMAGES

[1] Tasha sustained devastating permanent neurologic damage as a result of her negligent care. She is severely impaired, both in her mental and motor skills. She sustained damage to brain tissue as a result of increased intracranial pressure, a cerebral infarct (a form of stroke), and prolonged seizures which were left untreated. Tasha suffers severe static encephalopathy with spastic tetraparesis and contractures, severe psychomotor retardation, and a left hemianopia. Tasha functions both mentally and physically at about the level of a six or seven-month-old infant. Despite her mental and physical disabilities, during pretrial and trial proceedings I observed in her a distinct personality and rudimentary ability to express pleasure and displeasure. Tasha is fed through a g-tube. She will never be toilet trained and requires frequent diaper changes, approximately ten to twelve times per day. In addition, Tasha requires twice-weekly enemas to clear her bowels. Tasha's injuries are permanent and there is no hope for physical improvement. However, with good care and therapy she can maximize her mental development marginally and minimize her physical disabilities.

Despite the severity of Tasha's injuries and impairments, expert testimony established that Tasha has a normal life expectancy of an additional 73.92 years from the date of trial. Her life expectancy and its quality are clearly tied to the quality of her care.

A. Economic Damages

The plaintiffs' Rehabilitation Expert, Ms. Helen Woodard (Ms. Woodard), testified to the necessary services and reasonable costs of providing lifetime care for Tasha. The plan was not contested by the government except for three components in the areas of personal care, transportation expense and home modification. Indeed, the government's expert in this field could not say that any component of Ms. Woodard's plan was unnecessary or unreasonable but suggested alternate views in these three specific areas. Ms. Woodard presented a range of reasonable costs for each component of the plan. The plaintiff's economist, Dr. Singell, presented these costs discounted to present value. The government's economist disputed in some respects Dr. Singell's choice of discount factor but I am persuaded by Dr. Singell's approach and will apply it throughout. Where a range of costs was provided, I *730 award Tasha damages equal to the median cost.

1. Medical Care: Tasha will always require close medical supervision, including good pediatric care until she reaches the age of eighteen, and care by an internist after that age through the rest of her life. Tasha also will require neurological care as a result of her seizure disorder and orthopedic care for her physical deformities. Tasha should

have another hearing evaluation and periodic eye examinations. Tasha will require blood tests every six months to monitor the blood levels of her medications. Other health care needs and expenses will include developmental assessments every other year up to the age of twenty-one, dental care, and dietary consultations. Finally, because of Tasha's numerous neurologic and orthopedic ailments, it is probable that she will be hospitalized frequently throughout her life, at an average of seven days per year.

As a result of Tasha's injuries, she is not insurable through any market-based health insurance program. However, she is eligible for coverage through state operated high risk insurance programs, such as the Tennessee Comprehensive Health Insurance Program (TCHIP) (subject to a preexisting condition exclusion for six months). At the present time, TCHIP has lifetime benefits of $500,000, and an annual cap on out of pocket costs of $2,500. In order to protect the lifetime limits so that they will be available in case of serious illness and prolonged hospitalization or surgery, claims against this insurance coverage must be carefully limited.

Tasha is awarded $833,700 to cover these medical costs.

2. Medication and Supplies: Tasha's medications and supplies include prescription and over-the-counter medications, diapering and bowel care supplies, and gastrostomy and feeding supplies. Tasha is awarded $414,350 to cover her future cost of medication and supplies.

[2] 3. Personal Care: Tasha will never be able to care for herself or to do any remunerative work. She will require twenty-four hour a day care. Pursuant to the law in most states, this care must be provided by a licensed practical nurse (LPN) or by the parents because Tasha must be fed and her medications administered through the g-tube. Tasha must be monitored through the night and moved at least every four hours to change her position as she is unable to roll over.

Since her injuries, the parents have cared for Tasha at home and it is their intention to continue to do so, with the assistance of LPN care. However, at some point in time, Tasha's care may become too difficult for the parents to handle, either because of changes in Tasha's condition or a decrease in the parents' physical strength and stamina. At that time, Tasha may be transferred to a residential care facility.

Personal care is broken down into two time frames--before age 21 and after age 21. Before age 21, Tasha seeks damages sufficient to hire an LPN 16 hours per day, and a nurses aid for 8 hours at night, thus providing for her round the clock care. The government's rehabilitation expert, Dr. James Gracey (Dr. Gracey), presented lower cost alternatives to this pre-age 21 phase of the plan, none of which I found reasonable or persuasive.

As one alternative, the government, through Dr. Gracey, suggests that the parents substitute for the nurses aid for the 8 hours at night. Under this alternative, the parents care would not be compensated. I conclude that the full 24 hours

of required care should be compensated, whether performed by a nurses aid or by the parents. Moreover, requiring the parents to attend to Tasha during the night is beyond the level of care that would be required for a normal child. As of the date of this order, Cynthia Hill has not had eight hours of uninterrupted sleep since the date Tasha returned home from the hospital. Under the circumstances, eight hours of uninterrupted parental sleep is not unreasonable. Thus, I agree with plaintiffs that the compensation for Tasha's care should be on a 24 hour per day basis.

A second alternative presented by Dr. Gracey is to have an LPN care for Tasha during her feedings only--the time that particular level of care is required by law. This would *731 require a visit from an LPN three times per day for one to one and one-half hours per visit. Ms. Woodard testified, however, that there would be additional costs associated with this alternative, such as transportation time and expense due to the brevity of the visits. In sum, I find plaintiffs' proposal more reasonable and will award Tasha the sum of $185,000 annually to age 21 to cover the cost of 24 hour personal care. This award is $2,519,200 on a present value basis.

After age 21, Ms. Woodard testified that appropriate long term planning for Tasha will include placement into an individualized supported living arrangement. Ms. Woodard admitted on cross-examination by the government, however, that an individualized living arrangement is not the standard of care in the community for a person with Tasha's level of disability. Dr. Gracey testified that a more appropriate alternative for Tasha would be a community living

arrangement in a group home of two to eight disabled individuals. It is Dr. Gracey's opinion that this arrangement would provide a more stimulating environment for Tasha. The "cadillac" of such programs was estimated by Dr. Gracey to cost $350 per day, or $128,000 per year. Dr. Gracey's testimony on this issue is persuasive and reasonable. I will award Tasha $128,000 annually for age 21 through her life expectancy. On a present value basis, I compute this award to be $4,465,700.

[3] 4. Psychological Counseling and Family Support Services: Tasha's family requires psychological counseling to assist them in coping with Tasha's severe impairments. The purpose of this counseling is to benefit Tasha by helping her family cope with her demands and needs. Ms. Woodard recommended that this family counseling consist of three hours of counseling a week for two years, decreasing to one hour per week for an additional two years. Thereafter, the parents should participate in seminars to assist them in providing care to Tasha, approximately three seminars sometime during the next ten years. Finally, the parents should become members in one or more appropriate support groups. Tasha is awarded $43,550 to cover these expenses.

5. Case Management Services: Because of the extent and complexity of the medical and physical care services required by Tasha, Ms. Woodard testified that a case management professional should be retained to assist in the planning, coordination, and supervision of Tasha's care. The award required to provide for this service is $246,500.

[4] 6. Travel and Transportation Expenses: Tasha's physical impairments require special transportation facilities. Ms. Woodard indicates that the parents need a van modified with extra features to transport Tasha. Plaintiffs request the cost of a modified van, in the range of $28,500 to $32,900, to be replaced every 5 to 7 years. Dr. Gracey testified that a more accurate estimate of Tasha's transportation expense is the difference in cost between a car and a van, $12,000, plus the cost of modifying the van, $3,600, for a total of $15,600, to be incurred every 5 to 7 years. This estimate is based on the rationale that Tasha or her family would have incurred the average cost of a car throughout her life in any event. I find this rationale persuasive and will award Tasha transportation expenses on this basis. I compute the present value of this award to be $117,000.

7. Development Assessments: Ms. Woodard recommends that Tasha receive annual developmental assessments every year to age 14 and then every two years to age 21. The purpose of these assessments is to check Tasha's developmental progress and to assess her needs. Tasha is awarded $41,350 to provide this service.

8. Rehabilitation Services: Regular physical therapy is required (three clinic sessions per week through age seven, and two clinic sessions per week thereafter through the rest of her life), along with speech therapy (two clinic sessions per month through age seven), oral motor therapy (12 to 14 sessions per year), and occupational therapy (two clinic sessions per week for life). Improperly administered, such therapy can result in serious physical injury. Tasha's award to cover rehabilitation services is $1,164,900.

*732 9. Special Equipment: Special equipment is required for Tasha, including things such as a wheelchair, bath seat, hospital bed, orthotics, hoist, prone stander, feeder seat, and a grasshopper mobile positioning system. This equipment generally requires replacement every five to seven years. Tasha is awarded $131,250 to cover the cost of this equipment.

[5] 10. Home Modification Costs: Finally, the Hill family home requires modifications to accommodate Tasha's special equipment and needs, including ramps, widened doorways, thermostatic controls, an accessible bathroom with special bathing facilities, audio-visual and electronic monitoring equipment, and additional space for the non-family caregiver. These modifications, while expensive, do not typically add to the value of the home for resale.

The parties disagree on an appropriate amount for home modification. Plaintiffs estimate the renovation will range between $55,000 to $63,000. Defendants estimate the cost to be 20% to 25% of the average home price of $120,000 to $125,000, which calculates to be $20,000 to $31,250. Both experts concede that this is a difficult cost to determine. Because I am unable to determine which estimate is the most accurate, I will award the average of both party's estimates--$42,300. Accordingly, Tasha is awarded $42,300 to make the necessary modifications to her family's home.

Plaintiffs have requested the modification award to occur twice during Tasha's lifetime, immediately and at age 21. Because a group living arrangement after age 21 appears most reasonable, the need for an individualized modified

home at age 21 has been eliminated. Thus, this is to be a one-time award.

11. Future Loss in Earnings Capacity: As noted above, Tasha will never be able to engage in any remunerative occupation. The present value of her lost earnings over the course of her lifetime was estimated based upon the reasonable assumptions that she may have completed some college education and based upon an appropriate net discount rate. Tasha is awarded $508,600 for loss of future earnings.

B. Non-economic Losses

[6] Colorado law generally limits the recovery of non-economic damages to $250,000 per party, subject to the court's discretion to increase that amount to $500,000 based upon clear and convincing evidence. C.R.S. § 13-21-102.5(3)(a). I find that Tasha has suffered enormous pain and suffering and a manifest loss of enjoyment of life. I therefore find, by clear and convincing evidence, that Tasha is entitled to the payment of the maximum amount permissible under Colorado law, $500,000, for her non-economic losses. Although Tasha will continue to suffer these losses in the future, I elect to allocate the full amount allowable under Colorado law, $500,000, to the past damages.

C. Physical Impairment and Disfigurement

[7] In addition to economic and non-economic damages, an injured plaintiff in Colorado is entitled to recover damages for physical impairment and disfigurement. Herrera v.

Gene's Towing, 827 P.2d 619, 620-21 (Colo.App.1992). In this case it is clear that Tasha has suffered catastrophic injuries, which include severe impairment and disfigurement. In compensation for past and future impairment and disfigurement, I award Tasha $2,500,000.

III. STRUCTURE OF TASHA'S DAMAGE AWARD

[8] I have the inherent authority to structure damage awards or to impose trusts or reverter conditions to safeguard the best interest of the plaintiff. Hull v. United States, 971 F.2d 1499, 1506 (10th Cir.1992), cert. denied, --- U.S. ----, 113 S.Ct. 1844, 123 L.Ed.2d 469 (1993). I conclude that it may be in Tasha Hill's best interests to order that money damages awarded to Tasha Hill, with the exception of those for loss of earning capacity and non-economic loss, be held in a reversionary trust by an independent trustee, not a parent or legal relative of Tasha Hill. Because this issue was explicitly reserved for future hearing, I will address this question at a later time after a hearing conducted pursuant to Hull.

*733 IV. PARENTS' DAMAGES

1) Claim for Past Care of Tasha

[9] Cynthia and Robert Hill have stated a claim for damages for the care they have provided to Tasha. There is no dispute that Robert and Cynthia Hill have provided full-time care to Tasha over the past five and one-half years virtually equivalent to that of an LPN. They are entitled to recover the full value of these services from the government.

The expert testimony was that the parents' care for Tasha has been excellent. My observations during pretrial and trial proceedings confirms this testimony. As testified to by several of the plaintiffs' expert witnesses, Tasha requires 24 hour per day care. The government contests only the rate at which the value of these services should be calculated.

The parents seek compensation at the cost, identified by their rehabilitation expert, of providing 24 hour care for Tasha in the future, $185,000 per year. This totals $1,017,500 for the five and one-half year period. The government introduced no evidence on this issue and argues for a lesser amount, but presents no rational alternative. I consider the parents' prayer reasonable given that Tasha's care requires feeding and the administration of medications through a g-tube, a level of care which, by most state laws, must be provided by a licensed practical nurse. Cynthia Hill testified that she has provided approximately 70% of Tasha's care while Robert Hill has provided 30%. Thus, I award the $1,017,500 as follows: $712,250 to Cynthia Hill and $305,250 to Robert Hill.

2) Negligent Misrepresentation

[10] In a previous order, dated November 27, 1990, I denied the government's motion to dismiss the parents' claim for negligent misrepresentation holding that the misrepresentation exception, 28 U.S.C. s 2680(h), to the government's waiver of immunity is inapplicable in medical malpractice cases. See, e.g., Keir v. United States, 853 F.2d 398, 410-11 (6th Cir.1988); Ramirez v. United States,

567 F.2d 854, 856-57 (9th Cir.1977). The government is immune, however, to the extent such a claim seeks relief for economic losses. See Jardel Enters., Inc. v. Triconsultants, Inc., 770 P.2d
1301, 1304 (Colo.App.1988).

[11] Here, although the parents have established negligent misrepresentation on behalf of the government, they have failed to establish, by a preponderance of the evidence, their alleged damages proximately resulting from physical injury. Accordingly, I will deny recovery on this claim. The standard of care requires that infantile meningitis be treated by the most experienced physician and nursing staff available. Where, available, the infant should be treated in a pediatric intensive care unit. EACH did not have a pediatric intensive care unit. Further, if EACH had medical and nursing staff which was experienced in treating infantile meningitis, that staff was not consistently assigned to the care of Tasha Hill. Notwithstanding this lack of a pediatric intensive care unit and the inexperience of the EACH staff in treating infantile meningitis, the EACH staff represented to the parents that EACH had both the facilities and the staff necessary to properly care for Tasha and, in response to their concerns, specifically told the parents that it was not necessary to transfer Tasha to another hospital. The EACH staff made these representations knowing that the parents would rely on them. The parents relied on the representations of the EACH personnel and did not transfer Tasha. It is the parents testimony that had they been informed of EACH's lack of proper facilities and its inexperienced personnel, they would have arranged for Tasha's transfer to another hospital. Although the EACH

staff did not intend to mislead the parents to their detriment and the detriment of Tasha, I find that the EACH staff was negligent in representing to the parents that EACH had the facilities and the experienced staff necessary for proper care of infantile meningitis. Both parents testified generally that they are experiencing some back pain caused by excessive lifting of Tasha. This testimony was uncorroborated by any medical testimony. I am left to speculate as to causation. For example, Tasha has one older and two *734 younger siblings and Mr. Hill is a heavy equipment mechanic. I conclude that the parents have failed to prove by a preponderance of the evidence that they experienced physical injury as a proximate cause of the governments negligent misrepresentation. I will deny recovery on this claim.

3) Loss of Consortium

[12] There is no case law in Colorado allowing a claim by a parent against a third party for the loss of the society and companionship of a child due to injuries to the child caused by the wrongful conduct of that third party. The Colorado Supreme Court has denied, however, the analogous claim of a child for the loss of the society and companionship of an injured parent. See Lee v. Colorado Department of Health, 718 P.2d 221 (Colo.1986) The parents argue that legislation since the Lee decision suggests that the Colorado Supreme Court would reach a different result if faced with this issue today. The legislation the parents refer to is a 1985 amendment to the Colorado Wrongful Death Act, expanding the categories of damages which can be recovered in a wrongful death action. See C.R.S. s 13-21-203 (1993 Cum.Supp.). Under the old statute, damages were limited

to the net pecuniary losses resulting from the death of a family member, and no damages could be recovered for grief or loss of companionship. Espinoza v. O'Dell, 633 P.2d 455 (Colo.1981). The amendment to the statute now expressly authorizes the recovery of damages for "grief, loss of companionship, pain and suffering, and emotional stress...." C.R.S. s 13-21-203 (1993 Cum.Supp.). The parents also cite two cases from other states in which the courts, faced with the similar absence of case law, took it upon themselves to change the law in absence of specific legislative action and allow recovery for a parent's loss of companionship of a child. See e.g., Reben v. Ely, 146 Ariz. 309, 312, 705 P.2d 1360, 1363 (Ariz.App.1985); Norvell v. Cuyahoga County Hospital, 11 Ohio App.3d 70, 463 N.E.2d 111, 114 (1983). I am not persuaded by the parents' arguments. Following the example of the Colorado Supreme Court in Lee, I believe that this issue is one for the Colorado General Assembly. Accordingly, I will deny the parents claim for loss of companionship.

Accordingly, it is ORDERED that judgment enter in favor of Robert E. Hill and Cynthia Hill as parents and next friends of Tasha R. Hill against the government as follows:

1) economic damages (life care) of $10,019,800;

2) future loss of earning capacity of $508,600;

3) $500,000 in non-economic damages and $2,500,000 for physical impairment and disfigurement;

It is further ORDERED that judgment enter:

1) in favor of Cynthia Hill, individually, for $712,250, and Robert Hill, individually for $305,250, in compensation for their past care of Tasha;

2) in favor of the government upon the parents' claims for damages for negligent misrepresentation and loss of consortium.

It is further ORDERED that, pursuant to Section III herein, the structure of Tasha's award for economic damages shall be determined at a later hearing and set forth in a separate order. A scheduling hearing shall be held Wed., July 13, 1994 at 8:30 A.M.

It is further ORDERED that plaintiffs are awarded their costs.

JUDGMENT

PURSUANT TO and in accordance with the Findings of Fact, Conclusions of Law and Order filed June 8, 1994, by the Honorable Lewis T. Babcock, District Judge, it is

ORDERED that judgment is entered in favor of the plaintiffs, Robert E. Hill and Cynthia Hill, as parents and next friends of Tasha R. Hill, and against the defendant, United States of America, as follows:

1) economic damages (life care) of $10,019,800;

2) future loss of earning capacity of $508,600;

*735 3) $500,000 in non-economic damages and $2,500,000 for physical impairment and disfigurement;

It is FURTHER ORDERED that judgment is entered

1) in favor of plaintiff Cynthia Hill, individually, for $712,250, and in favor of plaintiff Robert Hill, individually, for $305,250, and against the defendant, United States of America, in compensation for plaintiffs' past care of Tasha;

2) in favor of the defendant, United States of America, and against the plaintiffs, Robert E. Hill and Cynthia G. Hill, upon the parents' claims for damages for negligent misrepresentation and loss of consortium, and those claims are dismissed.

It is FURTHER ORDERED that plaintiffs are awarded their costs upon the filing of a bill of costs within 10 days of the entry of judgment.

DATED at Denver, Colorado, this 8th day of June, 1994.

Robert E. HILL, individually, and as parent and next friend of Tasha R. Hill, a minor; and Cynthia G. Hill, individually, and as parent and next friend of Tasha R. Hill, a minor, Plaintiffs,

v.

UNITED STATES of America, Defendant/Third-Party Plaintiff,

v.

Richard J. HILL, M.D., Third-Party Defendant.

Civ. A. No. 90-B-1071.
United States District Court, D. Colorado.
Feb. 22, 1993.

Federal Tort Claims Act (FTCA) action was brought against United States alleging medical malpractice based on conduct in Colorado. The United States filed third-party complaint against patient's grandfather who had commenced physician-patient relationship with his granddaughter in Arizona. Grandfather moved to dismiss for lack of personal jurisdiction. The District Court, Babcock, J., held that the United States District Court for the District of Colorado lacked jurisdiction over nonresident physician under Colorado long-arm statute.

Motion granted.

See also 751 F.Supp. 909.

[1] FEDERAL COURTS k96
170Bk96
Plaintiff bears burden of establishing personal jurisdiction over defendant.

[2] FEDERAL COURTS k96
170Bk96
Before trial, plaintiff need only make prima facie showing of jurisdiction over defendant, and all disputes of fact are to be construed in a light most favorable to plaintiff.

[3] FEDERAL COURTS k76.25
170Bk76.25
Government was required to satisfy two-prong test to make its prima facie showing that court had personal jurisdiction over nonresident third-party defendant in Federal Tort Claims Act (FTCA) action; first, exercise of personal jurisdiction had to satisfy requirements of forum state's long-arm statute and second, it had to satisfy constitutional due process requirements. U.S.C.A. Const.Amend. 14.

[4] COURTS k12(2.1)
106k12(2.1)
Formerly 106k12(2)
Colorado's long-arm statute is coextensive with constitutional limitations imposed by due process clause. U.S.C.A. Const.Amend. 14.

[5] CONSTITUTIONAL LAW k305(5)
92k305(5)

Under due process clause, personal jurisdiction may not be asserted over party unless that party has sufficient minimum contacts with state, so that imposition of jurisdiction would not violate traditional notations of fair play and substantial justice. U.S.C.A. Const.Amend. 14.

[5] FEDERAL COURTS k76.5
170Bk76.5

Under due process clause, personal jurisdiction may not be asserted over party unless that party has sufficient minimum contacts with state, so that imposition of jurisdiction would not violate traditional notations of fair play and substantial justice. U.S.C.A. Const.Amend. 14.

[6] FEDERAL COURTS k76.10
170Bk76.10

To establish specific jurisdiction, nonresident defendant must do some act that represents an effort by defendant to purposely avail itself of privilege of conducting activities within forum state, and defendant does so when he purposely directs his foreign acts so that they have an effect in forum state.

[7] FEDERAL COURTS k76.25
170Bk76.25

United States District Court for the District of Colorado lacked jurisdiction under Colorado long-arm statute over nonresident physician who was being sued as third-party defendant by government, which was being sued in Federal Tort Claims Act action for medical malpractice; physician merely received phone call from Colorado regarding his patient's condition and recommendations for care were

discussed and he also called nursing staff at Colorado Army hospital where patient was receiving care and inquired about specific care being provided and did not make any diagnosis when patient was in hospital in Colorado or order any new procedures. U.S.C.A. Const.Amend. 14.

[8] FEDERAL COURTS k76.5
170Bk76.5

Under general jurisdiction, nonresident defendant may be subject to state's jurisdiction, even though alleged injury is unrelated to defendant's contacts with forum state.

[9] FEDERAL COURTS k76.5
170Bk76.5

If nonresident defendant's contacts with state are strong enough, state may assert jurisdiction over defendant on any matter, whether or not it arises out of defendant's contacts with state.

[10] FEDERAL COURTS k76.5
170Bk76.5

For general jurisdiction, nonresident defendant's contacts with state must be greater than those required for specific jurisdiction.

[11] FEDERAL COURTS k76.5
170Bk76.5

General jurisdiction over nonresident defendant is appropriate only when defendant has continuous and systematic general business contacts with forum state so that defendant could reasonably anticipate being haled into court in that forum.

*374 Shelly B. Don, Watson W. Galleher, Don, Hiller & Galleher, P.C., Denver, CO, for plaintiffs.
James W. Winchester, Sr. Litigation Counsel, U.S. Attys. Office, Denver, CO, for defendant/third party plaintiff.
Kevin J. Kuhn, Craig A. Adams, Montgomery Little & McGrew, P.C., Englewood, CO, Richard A. Kent, Bruce C. Smith, Teilborg, Sanders & Parks, Phoenix, AZ, for 3rd party defendant.

*375 MEMORANDUM OPINION AND ORDER
BABCOCK, District Judge.

In this Federal Tort Claims Act case, Dr. Richard J. Hill (Dr. Hill) moves to dismiss the government's third-party complaint for lack of personal jurisdiction. The issue is adequately briefed and oral argument will not materially aid in its resolution. I will grant Dr. Hill's motion for the reasons set forth below.

I.

Dr. Hill is Tasha Hill's grandfather. In August 1988 Dr. Hill commenced a physician-patient relationship with his granddaughter in Phoenix, Arizona when he administered initial immunizations and performed a "well-baby" check-up. On October 13, 1988, Dr. Hill administered to Tasha a second polio vaccine and a second immunization. At the time of this second immunization Tasha was in good health, but toward evening she became fussy and irritable. Dr. Hill instructed Tasha's mother, Cynthia Hill, to give Tasha tylenol. The next day Dr. Hill examined Tasha. He diagnosed a DPT reaction and a developing upper respiratory

tract infection due to bacteria. Dr. Hill prepared a 10-day supply of an antibiotic and recommended the parents continue giving Tasha tylenol as well as Dimetapp.

On October 15, when Robert and Cynthia Hill (Hills) left Phoenix for Ft. Carson, Colorado, taking Tasha with them, Dr. Hill told the Hills to continue the medications. Upon arrival in Colorado Springs shortly after midnight on October 16, the Hills called Dr. Hill and reported that Tasha had a fever of 101 degrees, was fretful, and not eating. Dr. Hill recommended feeding Tasha jello water. On Monday October 17, Tasha Hill was admitted to the Army hospital's Intensive Care Unit at Ft. Carson and was subsequently diagnosed with H-Flu meningitis. Tasha has developed neurological sequelae, including extensive brain injury which will result in severe retardation and cerebral palsy. The Hills allege that their daughter Tasha received negligent medical treatment while admitted to Evans Army Community Hospital and Fitzsimons Army Medical Center in Colorado. The Hills sued the United States for medical malpractice that the government doctors committed when she arrived in Colorado. Original jurisdiction over the Hills' suit exists under 28 U.S.C. s 1346. The United States seeks to join Dr. Hill in Colorado based on allegations that Dr. Hill's negligent treatment of Tasha contributed proximately to her injury. This court has original jurisdiction over the government's claim under 28 U.S.C. s 1345, as the government seeks damages under the Federal Medical Care Recovery Act, 42 U.S.C. s 2651, et seq.

II.

Dr. Hill filed a motion to dismiss for lack of personal jurisdiction. He argues that the exercise of jurisdiction would violate Colorado's long-arm statute and the Due Process Clause of the Fourteenth Amendment to the United States Constitution because he does not have "minimum contacts" with Colorado and he did not "purposely avail" himself of Colorado laws.

[1][2] A plaintiff bears the burden of establishing personal jurisdiction over a defendant. Behagen v. Amateur Basketball Ass'n of the United States, 744 F.2d 731, 733 (10th Cir.1984), cert. denied, 471 U.S. 1010, 105 S.Ct. 1879, 85 L.Ed.2d 171 (1985). Before trial, a plaintiff need only make a prima facie showing of jurisdiction. All disputes of fact are to be construed in a light most favorable to the plaintiff. Id.

[3][4] The government must satisfy a two-prong test to make its prima facie showing that I have personal jurisdiction over Dr. Hill. Shepard's McGraw-Hill, Inc. v. Legalsoft Corp., 769 F.Supp. 1161, 1162 (D.Colo.1991). This is true even in federal question actions where, as here, the underlying federal statute does not provide for nationwide service of process and process is served under the state long-arm statute. Id. The exercise of personal jurisdiction must satisfy the requirements of the forum state's long-arm statute as well as constitutional due process requirements. Id. at 1162-63. Colorado's long arm statute is coextensive with constitutional limitations imposed by the Due Process Clause. Mr. Steak, Inc. v. District *376 Court, 194 Colo. 519, 574 P.2d 95, 96 (1978). Therefore, if jurisdiction is consistent with the Due Process Clause,

Colorado's long arm statute authorizes jurisdiction over a nonresident defendant.

[5] Under the Due Process Clause of the Fourteenth Amendment, personal jurisdiction may not be asserted over a party unless that party has sufficient "minimum contacts" with the state, so that the imposition of jurisdiction would not violate "traditional notions of fair play and substantial justice." Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)).

A. Specific Jurisdiction

[6] To establish specific jurisdiction a defendant must do some act that represents an effort by the defendant to "purposely avail[ ] itself of the privilege of conducting activities within the forum State." Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). A defendant does so when he purposely directs his foreign acts so that they have an effect in the forum state. Kennedy v. Freeman, 919 F.2d 126, 128 (10th Cir.1990). The purposeful availment requirement serves two functions. First, it identifies acts that a defendant would reasonably expect to subject him to jurisdiction in a particular forum. Second, it ensures that only the defendant's acts directed at the forum establish jurisdiction. Burger King v. Rudzewicz, 471 U.S. 462, 474-75, 105 S.Ct. 2174, 2183-84, 85 L.Ed.2d 528 (1985).

In the context of doctor-patient litigation, the Tenth Circuit has indicated that special rules will apply to ensure that personal jurisdiction is asserted over a doctor only when he has purposely availed himself of the privileges of conducting activities within the patient's state. Kennedy, 919 F.2d at 129. The policy behind the special rules is a state's compelling interest in ensuring access to out-of-state, specialized medical care. Id. Courts have applied special jurisdictional rules when doctors who have essentially local practices become involved in another state, not as a result of their intention to do so but, rather, as a result of the action of their out-of-states patients. See e.g., Wright v. Yackley, 459 F.2d 287, 288-89 (9th Cir.1972) (no jurisdiction in Idaho over South Dakota doctor who treated his patient in South Dakota and merely phoned a prescription refill into Idaho);

McAndrew v. Burnett, 374 F.Supp. 460 (M.D.Penn.1974) (no jurisdiction in Pennsylvania over New York surgeon where negligent surgery occurred in New York and decedent subsequently moved to Pennsylvania and died there). Courts have found jurisdiction over nonresident doctors where they purposely directed their actions at plaintiffs' states. See e.g., Cubbage v. Merchant, 744 F.2d 665 (9th Cir.1984), cert. denied, 470 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed.2d 380 (1985) (jurisdiction proper in California over Arizona doctor who practiced near California border and advertised in California); McGee v. Riekhof, 442 F.Supp. 1276 (D.Mont.1978) (jurisdiction asserted over a Utah doctor on the basis of his phone call from Utah to Montana in which he rendered a negligent diagnosis to his Montana patient).

[7] The central issue in this case is whether Dr. Hill purposely availed himself of the privilege of conducting activities in Colorado by directing his activities there. The Government argues that Dr. Hill directed activities toward Colorado by: (1) receiving a phone call from the Hill's at 12:52 a.m. on Sunday, October 16, 1988 from Ft. Carson when Tasha's condition and Dr. Hill's recommendations for care were discussed, and (2) Dr. Hill's calling the nursing staff at the hospital in Ft. Carson where Tasha was receiving care and inquiring about the specific care being provided.

The government argues that these facts are indistinguishable from Kennedy, 919 F.2d at 126, a medical malpractice case filed in Oklahoma by an Oklahoma resident where the Tenth Circuit allowed jurisdiction over a Texas physician. I disagree and conclude that this case is distinguishable on its facts. Like Colorado, Oklahoma's long-arm statute is co-extensive with the Due Process Clause. Kennedy's Oklahoma physician consulted Dr. Freeman, a Texas physician. Dr. *377 Freeman misrepresented the size of a lesion taken from Kennedy's thigh, causing a negligent diagnosis for Kennedy in Oklahoma, knowing the significance of the consult and that it would be the basis of Kennedy's further treatment in Oklahoma. Id. at 129.

Here, during the phone call on October 16, 1988 initiated by the Hills, Dr. Hill made no new diagnosis. His recommendation to feed Tasha jello water was consistent with his diagnosis made in Arizona of a DPT reaction. (Dr. Hill deposition at 50, lines 5-8.) The deposition of Maureen Kelly, R.N., (Kelly) a member of the nursing staff at the Ft.

Carson hospital, indicates that Dr. Hill called on several occasions and inquired about the specific care and procedures for Tasha's treatment. (Kelly deposition at 10, lines 20-21.) Kelly did not indicate directly or inferentially that Dr. Hill made any diagnosis, ordered any new procedures or in any way changed the child's course of treatment. The government presents no evidence, direct or circumstantial, that Dr. Hill's calls to the Ft. Carson hospital had any bearing whatsoever on Tasha's care at Ft. Carson or the conduct of those charged with her care and treatment. In addition, Kelly admitted that she frequently receives calls from grandparents inquiring about the condition of their grandchildren. (Kelly deposition at 11, lines 13-23.)

Even considered in a light most favorable to the government, I conclude that Dr. Hill's actions are insufficient to qualify as purposeful availment of the privilege of conducting activities within the State of Colorado. Therefore, the exercise of specific jurisdiction over Dr. Hill contravenes the due process clause.

B. General Jurisdiction

[8][9] Under general jurisdiction, a nonresident defendant may be subject to a state's jurisdiction even though the alleged injury is unrelated to the defendant's contacts with the forum state. If a defendant's contacts with a state are strong enough, the state may assert jurisdiction over a defendant on any matter, whether or not it arises out of the defendant's contacts with the state. See Perkins v. Benquet Consol. Mining Co., 342 U.S. 437, 446, 72 S.Ct. 413, 418-19, 96 L.Ed. 485 (1952).

[10][11] For general jurisdiction, a defendant's contacts with a state must be greater than those required for specific jurisdiction. Doe v. National Medical Services, 974 F.2d 143, 146 (10th Cir.1992). General jurisdiction is appropriate only when a defendant has "continuous and systematic" general business contacts with the forum state, Helicopteros, 466 U.S. at 415, 104 S.Ct. at 1872, so that the defendant could reasonably anticipate being haled into court in that forum. See Burger King, 471 U.S. at 474, 105 S.Ct. at 2183 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980)).

Here, although Dr. Hill admits that he has visited the Hills four times in Colorado since October 1990, this minimal contact with the State of Colorado is clearly insufficient to support general jurisdiction. I conclude that Dr. Hill's contacts with the State of Colorado are insufficient to support the exercise of personal jurisdiction over Dr. Hill in conformity with the Due Process Clause.

Accordingly, it is ORDERED that Dr. Hill's motion to dismiss is GRANTED.

Robert E. HILL, individually and as parent and next friend of Tasha R. Hill, a minor; and Cynthia G. Hill, individually and as parent and next friend of Tasha R. Hill, a minor, Plaintiffs,

v.

UNITED STATES of America, Defendant.

Civ. A. No. 90-B-1071.
United States District Court,
D. Colorado.
Nov. 27, 1990.

Parents, individually and as parents and next friends of their child, brought medical malpractice suit under Federal Tort Claims Act. Government moved to dismiss. The District Court, Babcock, J., held that: (1) Colorado certificate of review requirement in medical malpractice actions applied to malpractice action under Federal Tort Claims Act; (2) medical malpractice of plaintiffs showed a good cause to permit filing of certificate of review out of time; and (3) misrepresentation exception to Federal Tort Claims Act did not apply to medical malpractice action.

Motion to dismiss denied.

[1] UNITED STATES k78(14)
393k78(14)

Colorado state requirement that in medical malpractice actions plaintiff file certificate of review by licensed

physician certifying that claim was made with "substantial justification" was applicable to action brought under Federal Tort Claims Act, since requirement was to be treated as substantive law of state. West's C.R.S.A. s 13-20-602(4).

[2] PHYSICIANS AND SURGEONS k18.20
299k18.20

Good cause was shown under Colorado law by medical malpractice plaintiff to file certificate of review out of time where application of Colorado's certificate of review requirement to Federal Tort Claims Act suit had been novel issue and delay in filing certificate in no way prejudiced United States. West's C.R.S.A. s 13-20-602(4); 28 U.S.C.A. s 2671 et seq.

[3] FEDERAL CIVIL PROCEDURE k1101
170Ak1101

Motion to dismiss for failure to state claim upon which relief can be granted is not appropriate vehicle to strike objectionable portions of complaint. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[4] UNITED STATES k78(9)
393k78(9)

Misrepresentation exception to Federal Tort Claims Act does not apply in noncommercial, medical malpractice context so as to render United States immune from liability on misrepresentation claim. 28 U.S.C.A. ss 2671 et seq., 2680(h).

*909 Shelly B. Don, Shelly B. Don, P.C., Denver, Colo., for plaintiffs.
James W. Winchester, Litigation Counsel, Denver, Colo., for defendant.

*910 MEMORANDUM OPINION AND ORDER

BABCOCK, District Judge.

This is an action under the Federal Tort Claims Act (FTCA). Robert and Cynthia Hill (Hills) allege that their daughter, Tasha R. Hill, received negligent medical treatment while admitted to Evans Army Community Hospital and Fitzsimons Army Medical Center in Colorado. The United States has moved to dismiss contending that: (1) the Hills failed to comply timely with the certificate of review requirements of Colo.Rev.Stat. s 13-20-602; (2) the Hills failed to state a claim for negligent infliction of emotional distress because they failed to allege that they were placed in fear for their own safety; and (3) the Hills failed to state a claim for negligent misrepresentation because the United States cannot be held liable for misrepresentations. I deny the motions. Federal Rule of Civil Procedure 12(b)(6) provides that defendants may state as a defense "failure to state a claim upon which relief can be granted." I review the complaint liberally and in the light most favorable to the Hills. Haines v. Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 594, 595-96, 30 L.Ed.2d 652 (1972); Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

I. CERTIFICATE OF REVIEW

[1] The United States argues that plaintiffs suing under the FTCA for medical malpractice must comply with the Colorado state requirement that in medical malpractice actions, plaintiffs must file a certificate of review by a licensed physician certifying that their claim is made with "substantial justification." Colo.Rev.Stat. s 13-20-602. Failure to so certify, the United States contends, requires mandatory dismissal of the action. Colo.Rev.Stat. s 13-20-602(4).

I apply Colorado state substantive malpractice law and federal procedural law under the FTCA. See United States v. Yellow Cab Co., 340 U.S. 543, 553, 71 S.Ct. 399, 406, 95 L.Ed. 523 (1951) (apply Federal Rules of Civil Procedure in FTCA actions). The United States argues that the Colorado certificate of review statute is substantive.

In Oslund v. United States, 701 F.Supp. 710, 712-14 (D.Minn.1988), the district court held that Minnesota's affidavit requirement, Minn.Stat s 145.682, applied in FTCA medical malpractice actions as substantive law of the state. The court reasoned that "the language requiring mandatory dismissal of claims has a jurisdictional component." Oslund at 714. Under a contrary conclusion, the court stated, "the anomalous result would be that the federal government would be exposed to liability when a cause of action involving similar conduct would be dismissed in a diversity case or in a state court action." I find this rationale persuasive. Consequently, I conclude that Colorado's certificate of review mandate applies here.

[2] I need not dismiss, however. The Hills have moved to file a certificate of review out of time. I may grant such a request "for good cause shown." Colo.Rev.Stat. s 13-20-602(1). I find good cause because the statute's application to a FTCA medical malpractice action is a novel issue in this District and the Tenth Circuit. Furthermore, I find that the delay in filing the certificate in no way prejudices the United States.

II. NEGLIGENCE

The United States contends that the first claim for relief, labeled as one for negligence, is more precisely one to recover for negligent infliction of emotional distress. The United States asserts that I should dismiss this claim on the ground that the Hills fail to allege in their complaint that the negligence placed them in fear for their safety. See Kimelman v. City of Colorado Springs, 775 P.2d 51, 52 (Colo.App.1988), cert. denied, --- U.S. ----, 110 S.Ct. 512, 107 L.Ed.2d 514 (1989). I disagree with the United States' characterization of the claim and thus deny this portion of their motion.

[3] The claim is not solely for recovery for emotional injury, but alleges economic losses as well. Rule 12(b)(6) is not the *911 appropriate vehicle to strike objectionable portions of a complaint.

III. MISREPRESENTATION

[4] The United States contends that the second claim for relief, labeled as one for negligent misrepresentation, must

be dismissed because the United States is immune from liability on misrepresentation claims. See 28 U.S.C. s 2680(h). Although this section provides a misrepresentation exception to the FTCA, that exception does not apply in this non-commercial, medical malpractice context.

To the extent a claim seeks relief for economic losses resulting from misrepresentations in a commercial context, the United States is immune. Here, however, the claim is for damages caused by medical malpractice. The claim alleges that "the Defendant negligently gave false information to the Plaintiffs conveying the false impression that Tasha Hill's condition was improving during their treatment of her and that Plaintiffs, in reliance upon these communications, failed to seek other treatment alternatives that would have been available." Plaintiffs' Response to Motion to Dismiss, at 3. This claim is, in substance, one for medical malpractice.

I conclude, as have several courts before me, that the misrepresentation exception to the United States' waiver of immunity is inapplicable in malpractice cases. See, e.g., Keir v. United States, 853 F.2d 398, 410-11 (6th Cir.1988); Ramirez v. United States, 567 F.2d 854, 856-57 (9th Cir.1977); Phillips v. United States, 508 F.Supp. 544, 547-48

(D.S.C.1981); see also Hicks v. United States, 511 F.2d 407, 413-14 (D.C.Cir.1975); Betesh v. United States, 400 F.Supp. 238, 241 (D.D.C.1974). This interpretation of the misrepresentation immunity section is consistent with the legislative history of the FTCA. The refusal of congress to

adopt an amendment specifically retaining immunity in malpractice actions supports the conclusion that Congress did not intend to defeat actions for malpractice against the United States. See Keir, 853 F.2d at 411; Ramirez, 567 F.2d at 857.

Accordingly, it is ORDERED that

(1) The United States of America's Motions to Dismiss are DENIED;

(2) Robert and Cynthia Hill may file their tendered certificate of review out of time.

COLORADO REVISED STATUTES
TITLE 13. COURTS AND COURT PROCEDURE
JUDGMENTS AND EXECUTIONS
ARTICLE 64. HEALTH CARE AVAILABILITY ACT

PART 1. SHORT TITLE--LEGISLATIVE DECLARATION

Sec. 13-64-101. Short title

This article shall be known and may be cited as the "Health Care Availability Act".

Sec. 13-64-102. Legislative declaration

The general assembly determines and declares that it is in the best interests of the citizens of this state to assure the continued availability of adequate health care services to the people of this state by containing the significantly increasing costs of malpractice insurance for medical care institutions and licensed medical care professionals, and that such is rationally related to a legitimate state interest. To attain this goal and in recognition of the exodus of professionals from health care practice or from certain portions or specialities thereof, the general assembly finds it necessary to enact this article limited to the area of medical malpractice to preserve the public peace, health, and welfare.

PART 2. PERIODIC PAYMENTS OF TORT JUDGMENTS

Sec. 13-64-201. Legislative declaration

(1) The general assembly declares the purposes of enacting this part 2 are to:

(a) Alleviate the practical problems incident to the unpredictability of future losses;

(b) Effectuate more precise awards of damages for actual losses;

(c) Pay damages as the losses are found to accrue;

(d) Assure that payments of damages more nearly serve the purposes for which they are awarded;

(e) Reduce the burden on public assistance costs created by the dissipation of lump-sum payments; and

(f) Conform to the income tax policies in the federal "Internal Revenue Code of 1986" and the laws of this state with respect to compensation for personal injuries.

Sec. 13-64-202. Definitions

As used in this part 2, unless the context otherwise requires:

(1) "Economic loss" means pecuniary harm for which damages are recoverable under the laws of this state.

(2) "Future damages" means damages of any kind arising from personal injuries which the trier of fact finds will accrue after the damages findings are made.

(3) "Health care institution" means any licensed or certified hospital, health care facility, dispensary, or other institution for the treatment or care of the sick or injured.

(4)(a) "Health care professional" means any person licensed in this state or any other state to practice medicine, chiropractic, nursing, physical therapy, podiatry, dentistry, pharmacy, optometry, or other healing arts. The term includes any professional corporation or other professional entity comprised of such health care providers as permitted by the laws of this state.

(b) The term does not include a registrant conducting unlicensed midwifery pursuant to article 37 of title 12, C.R.S., or any corporate or business organization or entity comprised of one or more of such registrants. This paragraph (b) is repealed, effective July 1, 1996.

(5) "Noneconomic loss" means nonpecuniary harm for which damages are recoverable under the laws of this state, but the term does not include punitive or exemplary damages.

(6) "Past damages" means damages that have accrued before the damages findings are made, including any

punitive or exemplary damages allowed by the laws of this state.

(7) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the judgment is entered.

(8) "Qualified insurer" means an insurance company licensed to do business in this state or any self-insurer, assignee, plan, or arrangement approved by the court.

Sec. 13-64-203. Periodic payments

(1) In any civil action for damages in tort brought against a health care professional or a health care institution, the trial judge shall enter a judgment ordering that awards for future damages be paid by periodic payments rather than by a lump-sum payment if the award for future damages exceeds the present value of one hundred fifty thousand dollars, as determined by the court.

(2) In any such action in which the award for future damages is one hundred fifty thousand dollars or less, present value, the trial judge may order that awards for future damages be paid by periodic payments.

Sec. 13-64-204. Special damages findings required

(1) If liability is found in a trial under this part 2, the trier of fact, in addition to other appropriate findings, shall make separate findings for each claimant specifying the amount of:

(a) Any past damages for each of the following types:

(I) Medical and other costs of health care;

(II) Other economic loss except loss of earnings;

(III) Loss of earnings; and

(IV) Noneconomic loss.

(b) Any future damages and the period of time over which they will be paid, for each of the following types:

(I) Medical and other costs of health care;

(II) Other economic loss except loss of future earnings which would be incurred for the life of the claimant or any lesser period;

(III) Loss of future earnings which would be incurred for the work life expectancy of the claimant or a lesser period; and

(IV) Noneconomic loss which would be incurred for the life of the claimant or any lesser period.

(2) The calculation of all future damages under subparagraphs (I), (II), and (IV) of paragraph (b) of subsection (1) of this section shall reflect the costs and losses during the period of time, including life expectancy, if appropriate, that the claimant will sustain those costs and losses. The calculation of loss under subparagraph (III) of paragraph (b) of subsection (1) of this section shall be based on loss during the period of time the claimant would have earned income but for the injury upon which the claim is based.

(3) The fact that payment of any judgment will be paid by periodic payments shall not be disclosed to a jury.

Sec. 13-64-205. Determination of judgment to be entered

(1) In order to determine what judgment is to be entered on a verdict requiring findings of special damages under this part 2, the court shall proceed as follows:

(a) The court shall apply to the findings of past and future damages any applicable rules of law, including setoffs, credits, comparative fault, additurs, and remittiturs in calculating the respective amounts of past and future damages each claimant is entitled to recover and each party is obligated to pay. The court shall preserve the rights of any subrogee to be paid in a lump sum.

(b) The court shall specify the payment of attorney fees and litigation expenses in a manner separate from the periodic installments payable to the claimant, either in a lump-sum or by periodic installments, pursuant to any

agreement entered into between the claimant or beneficiary and his attorney, computed in accordance with the applicable principles of law.

(c) The court shall enter judgment in a lump sum for past damages and for any damages payable in lump sum or otherwise under paragraphs (a) and (b) of this subsection (1).

(d) After hearing relevant expert testimony, the jury shall determine the present value of future damages and, except as provided in paragraphs (e) and (f) of this subsection (1), the court shall enter judgment for the periodic payment of future damages. The court, in considering evidence of the need for one or more future major medical proceedings or services, may enter judgment for lump-sum payment therefor, payable either immediately or at some designated date or dates in the future.

(e) Upon petition of a party before entry of judgment and a finding of incapacity to fund the periodic payments, the court, at the election of the claimant or at the election of the beneficiaries in an action for wrongful death, shall enter a judgment for the present value of the periodic payments.

(f) Within no more than three months after the entry of verdict by the trier of fact and before the court enters judgment for periodic payments, the plaintiff who meets the criteria set forth in this subsection (1) may elect to receive the immediate payment to the plaintiff of the present value of the future damage award in a lump-sum amount in lieu of periodic payments. In order to exercise this right, the plaintiff must:

(I) Have reached his twenty-first birthday by the time the periodic payment order is entered;

(II) Not be an incapacitated person, as defined in section 15-14-101(1), C.R.S.; and

(III) Have been provided financial counseling and must be making an informed decision.

Sec. 13-64-206. Periodic installment obligations

(1) A judgment for periodic payments under this part 2 shall provide that:

(a) Such periodic payments are fixed and determinable as to amount and time of payment;

(b) Such periodic payments cannot be accelerated, deferred, increased, or decreased by the recipient of such payments; and

(c) The recipient of such payments shall be a general creditor of the qualified insurer.

(2) Unless the court directs otherwise and the parties otherwise agree, payments shall be scheduled at one-month intervals. Payments for damages accruing during the scheduled intervals are due at the beginning of the intervals. For good cause shown, the court may direct that periodic payments shall continue for an initial term of years notwithstanding the death of the judgment creditor during that term.

(3) Money damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor. Any such remaining periodic payments shall be paid to the heirs and devisees of the judgment creditor. Payments for future damages other than loss of future earnings shall cease at the death of the judgment creditor.

Sec. 13-64-207. Form of funding

(1) A judgment for periodic payments entered in accordance with this part 2 shall provide for payments to be funded in one or more of the following forms approved by the court:

(a) Annuity contract issued by a company licensed to do business as an insurance company under the laws of this state;

(b) An obligation or obligations of the United States;

(c) Evidence of applicable and collectible liability insurance from one or more qualified insurers;

(d) An agreement by one or more personal injury liability assignees to assume the obligation of the judgment debtor;

(e) An obligation of the state of Colorado or of a public entity other than the state which is self-insured as provided in section 24-10-115, 24-10-115.5, or 24-10-116, C.R.S.; or

(f) Any other satisfactory form of funding.

(2) The court shall require that the annuity contract or other form of funding permitted by subsection (1) of this section show that portion of each periodic payment which is attributable to loss of future earnings and that portion attributable to all other future damages.

Sec. 13-64-208. Funding the obligation

(1) If the court enters a judgment for periodic payments under this part 2, then each party liable for all or a portion of the judgment, unless found to be incapable of doing so, shall separately or jointly with one or more others provide the funding for the periodic payments in a form prescribed in section 13-64-207, within sixty days after the date the judgment is entered. A liability insurer having a contractual obligation and any other person adjudged to have an obligation to pay all or part of a judgment for periodic payments on behalf of a judgment debtor is obligated to provide such funding to the extent of its contractual or adjudged obligation if the judgment debtor has not done so.

(2) A judgment creditor or successor in interest and any party having rights under subsection (4) of this section may move that the court find that funding has not been provided with regard to a judgment obligation owing to the moving party. Upon so finding, the court shall order that funding complying with this article be provided within thirty days. If funding is not provided within that time and subsection (3) of this section does not apply, then the court shall calculate the present value of the periodic payment obligation and

enter a judgment for that amount in favor of the moving party.

(3) If a judgment debtor who is the only person liable for a portion of a judgment for periodic payments fails to provide funding, then the right to present value payment described in subsection (2) of this section applies only against that judgment debtor and the portion of the judgment so owed.

(4) If more than one party is liable for all or a portion of a judgment requiring funding under this part 2 and the required funding is provided by one or more but fewer than all of the parties liable, the funding requirements are satisfied and those providing funding may proceed under subsection (2) of this section to enforce rights for funding or present value payment to satisfy or protect rights of reimbursement from a party not providing funding.

Sec. 13-64-209. Assignment of periodic payments

(1) An assignment by a judgment creditor or an agreement by such person to assign any right to receive periodic payments for future damages contained in a judgment entered under this part 2 is enforceable only as to amounts:

(a) To secure payment of alimony, maintenance, or child support;

(b) For the costs of products, services, or accommodations provided or to be provided by the assignee for medical or other health care; or

(c) For attorney fees and other expenses of litigation incurred in securing the judgment.

Sec. 13-64-210. Exemption of benefits

Except as provided in section 13-64-209, periodic payments for future damages contained in a judgment entered under this part 2 for loss of earnings are exempt from garnishment, attachment, execution, and any other process or claim to the extent that wages or earnings are exempt.

Sec. 13-64-211. Settlement agreements and consent judgments

Nothing in this part 2 is to be construed to limit or affect the settlement of actions triable under this part 2 nor shall it apply to the settlement of actions except as otherwise agreed to by the parties. Parties to an action on a claim for personal injury may, but are not required to, file with the clerk of the court in which the action is pending or, if none is pending, with the clerk of a court of competent jurisdiction over the claim a settlement agreement for future damages payable in periodic payments. The settlement agreement may provide that one or more sections of this part 2 apply to it.

Sec. 13-64-212. Satisfaction of judgment

Upon entry of an order by the court that the form of funding complies with section 13-64-207 and that the funding of the obligation complies with section 13-64-208, the court

shall order a satisfaction of judgment and discharge of the judgment debtor.

Sec. 13-64-213. Effective date--applicability of part

This part 2 shall take effect July 1, 1988, and shall apply to acts or omissions occurring on or after said date.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-B-1071

ROBERT E. HILL, individually, and as parent and next friend of Tasha R. Hill, a minor; and CYNTHIA G. HILL, individually, and as parent and next friend of Tasha R. Hill, a minor,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
TRIAL TO COURT

Before the HONORABLE LEWIS T. BABCOCK, Judge,

United States District Court for the District of Colorado, commencing at 1:15 p.m. on the 24th day of May, 1994, in Courtroom C-204, United States Courthouse, Denver, Colorado.

APPEARANCES

FOR THE PLAINTIFFS: SHELLEY B. DON, ESQ.
DAVID L. HILLER, ESQ.
1737 Gaylord Street
Denver, CO 80206

FOR THE DEFENDANT: STEPHEN D. TAYLOR, ESQ.
JOHN P. MORAN, ESQ.
Assistant U. S. Attorneys
1961 Stout Street, #1100
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GWEN DANIEL
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TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

time that you have re-reviewed this information here today, have you?

A. No, I have not.

Q. And is it -- was it, and is it still, your opinion that Tasha Hill, based on her clinical condition today and over the past five years, based on your review of the medical records, has a normal life expectancy?

A. I have felt, and I continue to feel, that she has a normal expectancy because she has none of the underlying risk factors that would seriously shorten longevity.

MR. DON: Thank you.

THE COURT: Mr. Taylor.

MR. TAYLOR: No recross.

THE COURT: Thank you, Doctor. I think you may be excused, sir.

(The witness was excused.)

MR. DON: Your Honor, we have two witnesses left. One is the brief conclusion of Robert Hill's direct examination, and whatever cross will ensue, and then the testimony of our economist, Dr. Singell. It's my understanding that counsel has withdrawn any objection to Dr. Singell's testimony, subject to the previously made objection that the government has put forth to the application of the Colorado Health Care Availability Act, and, as the Court knows, or as the Court may know, we have

introduced in Dr. Singell's testimony evidence so that the Court may adjust its findings to its conclusion on the legal issue of that applicability of that Act and make findings either way.

That being the case, I would leave it to the Court to tell me if the Court desires to review Dr. Singell's testimony by his deposition, or if the Court would like to view it on the video tape.

We have in Court, and are prepared to produce, his video tape, but I think it's only necessary -- of course subject to counsel's concurrence with my remarks -- to do it in the courtroom or in this setting, if that's the Court's desire, and, if not, I believe if we can have a few minutes to conclude with Mr. Hill, subject to that, the plaintiffs are prepared to rest their case.

THE COURT: Well, frankly, given my schedule -- how long does the video run?

MR. DON: I think it's a total of two and a half hours.

THE COURT: Well, I think it would be helpful for me to -- I think I want to watch the video. Now in many cases -- most cases I wouldn't do it. But it's kind of a contextual thing, and, frankly, I think it might be helpful for me to watch it.

MR. DON: In that case, your Honor, may we rearrange

the schedule and set up the video immediately so that we can conclude -- hopefully do our best to conclude that testimony today, and then follow up with whatever finishing testimony we need from Mr. Hill?

THE COURT: Sure. You need a short recess?

MR. DON: Just a few moments to set it up.

THE COURT: Okay. Let me know when you are ready.

(Recess at 2:35 p.m.)

(Recess at 2:35 until 2:45.)

THE COURT: Please be seated. Before we play this video, let me see if I can't get straight in my mind here the problem that counsel presents with the economist's testimony of damages under the Health Care-Availability Act.

Now as I understand Part 2 of that Act, 1364, 201, et seq., what it requires is that a court make separate findings for each claimant specifying the amount of past damages itemized on the basis of medical and other costs of health care, other economic loss except lost earnings, loss of earnings, and non-economic loss. And as to any future damages, and the period of time over which they will be paid, itemized for medical and other costs of health care, other economic loss except future earnings which would be incurred for the life of the claimant, or any lesser period, loss of future earnings which would be incurred for the work life expectancy of the claimant, or lesser period, and non-economic loss which would be incurred for the life of the claimant or any lesser period.

And the calculation of future damages under subparagraphs I, II and IV, paragraph (b) of subsection 1, must reflect the cost and losses during the period of time, including life expectancy.

Then moving from that section 204 to section 205, the statute sets out the means for determination of judgment

to be entered. Now the reason why I am addressing that now is because it's self-evident that a judgment will be entered. First of all, the Court specifies payment of attorney fees, and that is taken care of; secondly, and maybe this is what is raised by the government under subsection (c) of 205, "The Court shall enter judgment in a lump sum for past damages and for any damages payable in a lump sum or otherwise under subparagraphs (a) and (b) of subsection 1," and obviously the damages in this case are going to exceed the threshold of the statute.

It requires that after hearing relevant expert testimony, the jury, in this case the Judge, shall determine present value of future damages and enter judgment for periodic payments of future damages. And then in section 206, subparagraph II, it requires that the payments be scheduled at one month intervals.

Now as I understand it what this statute is saying is that the judgment purely read and applied, the judgment - provides for a judgment in a lump sum, but then structures a pay-out over a period of time.

And as I understand the government's problem in this case is its insistence, perhaps correctly so, that the State of Colorado can't require the United States government to, as a judgment debtor, make these payments monthly over an

extended period of time. Correct, Mr. Taylor?

MR. TAYLOR: Yes, your Honor, that is correct.

THE COURT: All right. Now my question is one of why we can't satisfy the statute by providing for the judgment and payment in a lump sum, but funded, for example, with an annuity as specifically authorized by the statute or into the payment of a trust as structured in Hull versus Hull, with any reversionary interest then to inure to the benefit of the government as the judgment debtor.

Now is there any reason why we can't do that?

MR. TAYLOR: Your Honor, that's what we would propose would happen, so that there is a judgment for a lump sum, and then put into an annuity and reverts back.

THE COURT: Now how that's structured, whether it's 10 years certain or whether there's a reversionary interest for some lesser time, or just how, that's a subject I don't want to necessarily address now. I don't think it's appropriate right now.

But why doesn't that satisfy the plaintiff in terms of federal requirements with an overlay of the mechanical requirements of the statute under the State of Colorado?

MR. HILLER: Your Honor first of all, if the government objects to the applicability of the Health Care Availability Act, then the plaintiffs are perfectly willing to accept the entry of judgment pursuant to other statutory

and common law rules in the Federal Tort Claims Act.

We presented this to the Court because it's there and we didn't want to ignore it. But if the government doesn't feel like this Act is applicable, it's an enormous nightmare for everybody here, and the plaintiffs are perfectly willing to accept a court decision based upon the government's -- or based upon the parties' agreement that the Act doesn't apply.

MR. TAYLOR: Your Honor, the government's been willing to stipulate to that for as long as this issue has been brought up. They agreed to stipulate that the Act does not apply.

THE COURT: You know, I would have paid much greater attention to the New York Knicks and the Chicago Bulls this last weekend and other various and sundry interesting sporting events over the course of the last week or so if I had known that.

MR. HILLER: Well, your Honor, I --

THE COURT: If the parties want to stipulate away the applicability of this statute for the purposes of this Federal Tort Claims Act case, I would be willing to accept that stipulation. Now that doesn't mean that it is not helpful or instructive to break down on a periodic basis on discounted values an analysis of the-damages. I mean that's helpful in any case. But if you want to stipulate away the

applicability of this Act, I don't see why not.

MR. TAYLOR: Your Honor, I think the government has made that position clear from the beginning, and I think at the pretrial there was statements made by the government that they would stipulate to that, and it was the plaintiffs that during those pretrial conferences that said they couldn't or wouldn't.

MR. HILLER: Well, your Honor, I think that our concern was, frankly, that we weren't sure that we can appropriately do that. We haven't found law that tells us that we can't, and the Court has indicated that it's willing to accept such a stipulation, so for practical reasons the plaintiffs are willing to stipulate that the statute doesn't apply.

Having spent a good part of my life here over the past couple of months trying to interpret the statute, I can sympathize and apologize for the Court's struggle. I think that there actually are a couple of nuances here that the Court didn't -- at least you didn't express here in your reading of the statute a couple of minutes ago, and I can go into that, but again --

THE COURT: Well, if it doesn't apply, then we don't need to get into these -- I mean I have been troubled enough with the statute anyway. You know, the only -- and I can't speak -- not only can't, but would not attempt to speak for

the Tenth Circuit, but if everybody here agrees, and I accept the agreement, that the statute does not apply in this case, then it would seem to me that all parties are bound by that stipulation, and that on appeal there's nothing to be raised to be presented to the Tenth Circuit Court of Appeals.

MR. HILLER: Well, your Honor, that's been the analysis that we finally came to. Obviously our only concern is protecting this matter on appeal, and it seems to us that if the parties stipulate that it doesn't apply, then there is nothing to be presented to the Court of Appeals on this issue.

THE COURT: That seems rather basic and rudimentary to me. Do you agree, Mr. Taylor?

MR. TAYLOR: Yes, your Honor. That's kind of been our position for quite a while.

THE COURT: To the shredder with this beast.

MR. HILLER: My regrets, your Honor.

THE COURT: Huh?

MR. HILLER: Let me take up the second part of your question very briefly, and that is how can the lump sum award be appropriately structured, and I don't think we can or need to address that right now.

THE COURT: No, we don't, and the guidance we have in the Tenth Circuit is Hull versus U.S.

MR. HILLER: It's our reading of Hull that says it's

the needs of the plaintiffs that determine the appropriate structuring, including the trust, in that case a trust with a reversion to the government under those circumstances. And we will be prepared to talk to the Court when the time is ripe to address the structure.

THE COURT: Certainly. And as Judge Ebel says, the overriding concern is the well-being of the child. Now --

MR. TAYLOR: And the government would certainly agree with that.

THE COURT: Sure. And, you know, that makes sense. Now the way I would propose to deal with this would be to determine what the judgment is, and then it may be that we will need -- but stay the -- determine what -- well, the bottom line, you fill in the blanks here, and it may well be that we will need some post-trial hearings either evidentiary or by argument or both to satisfy the findings that the Tenth Circuit would require in a way in which the -- and I think a trust might be a good idea. But to structure it under the teachings of Hull.

MR. TAYLOR: Yes, your Honor, I would agree with that. I think that it would be good to have some input like that after the bottom line is determined.

THE COURT: Sure, but we can't apply Hull yet because we don't yet have a judgment to apply, and I think we have to have that as a predicate before then moving into

addressing the concerns that the Circuit expressed to the Oklahoma judge in Hull.

Given that, it may be that I want to re-think the need for viewing the video deposition. My inclination to view it was based on some concern about how that testimony would interact with or relate to the Health Care Availability Act in the State of Colorado as it may apply in this case, and I was concerned that if I had questions that came to mind as I viewed the video, that I wanted to have counsel available to -- for dialogue on those questions as they might have arisen. But now that that Act is out of this case, I don't see the necessity really for viewing the video. I think we can save everyone time and simply read the deposition.

MR. HILLER: Well, your Honor, it's a much more straightforward economic analysis based on Helen Woodard's testimony and running those numbers to represent value.

THE COURT: Yeah. I mean I've read the economist's CV, and I've read the report, and it is the two underlying key assumptions, other than discount rates, have to do with life expectancy and with Helen Woodard's opinions in this case concerning her life care plan.

So I understand that, and I think we can probably deal with the economist's testimony by way of deposition if you want to just admit that as an exhibit.

MR. TAYLOR: Your Honor, the government would not oppose that.

MR. HILLER: That's fine, your Honor. We then would move the admission of the deposition testimony of Dr. Larry Singell and also the CV.

THE COURT: Yeah. And has that -- well, and then there is the report that goes along with it that I think is --

MR. HILLER: It's Exhibit 185, I believe, your Honor.

THE COURT: 180 --

MR. HILLER: 185.

THE COURT: 184, the CV, has been admitted, and 185 will be the report.

MR. TAYLOR: We have no objection.

THE COURT: All right. It will be admitted. Let me just add -- well, let's take this one step at a time. The deposition has not been marked as an exhibit number?

MR. HILLER: It has not, your Honor. I have the original here along with the original videotape.

THE COURT: Yeah. I don't know that we need the videotapes. Why don't we mark this as 194 -- 195. I am sorry.

MR. TAYLOR: And the government has no objection to the entry of 195.

THE COURT: All right.

MR. HILLER: Your Honor, may I open the envelope so we can mark the deposition transcript itself?

THE COURT: Sure, go ahead. 195 is admitted. It seemed like there was -- is there an exhibit number for -- I guess Dr. Singell's report contains the life expectancy table?

MR. HILLER: Yeah, the U.S. life tables are a part of his report in Exhibit 185.

THE COURT: All right. Okay. I think that answers all of my questions.

MR. HILLER: Your Honor, excuse me. The life table that Dr. Singell refers to is a separate exhibit, it's 186, which is from the -- it's the United States government publication. So we would move the admission of Exhibit 186 also at this time.

MR. TAYLOR: No objection.

THE COURT: Admitted.

MR. HILLER: Lastly, your Honor, to further complicate things, Dr. Singell actually made some corrections to his -- the deposition of his -- preservation deposition for his trial testimony. I believe that those corrections were to clarify only the life expectancy issue as it pertained to the Health Care Availability Act calculations; therefore, I don't think that it's really pertinent, but

since he has signed it, and it was delivered to the court reporter, and as I have been told that it is on its way here, the original correction sheet here is being delivered from the court reporter's office, I wanted to inform the Court of that, and we will tender that as soon as it arrives.

THE COURT: Well, let's let Mr. Taylor look at it to see if that presents any problem.

MR. TAYLOR: Thank you, your Honor.

MR. HILLER: Lastly, your Honor, I guess I want to inform the Court that there was another Exhibit 185-A which was the notebook that we tendered which runs out the calculations of the life care expenses pursuant to the Health Care Availability Act. Because we have stipulated that the Act is not applicable here, it is not necessary that this be offered into evidence, but we do want to make the Court aware of the fact that it's there and the -- Dr. Singell's opinion as to present value, which is the pertinent basis for judgment, as long as we are not under the Health Care Availability Act, is included both in his report Exhibit 185 and in his deposition testimony. So this is there, but we're not offering it, because it's no longer pertinent.

THE COURT: All right. Okay.

MR. TAYLOR: Your Honor, I think we just have one witness for the plaintiff and tomorrow afternoon we have a witness for the defendant and Thursday afternoon we have a

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-B-1071

ROBERT E. HILL, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT
SCHEDULING AND HEARING CONFERENCE

Proceedings before the HONORABLE LEWIS T. BABCOCK, Judge, United States District Court for the District of Colorado, commencing at 8:30 a.m., on the 13th day of July, 1994, in Courtroom C-204, United States Courthouse, Denver, Colorado.

APPEARANCES

SHELLEY B. DON, DAVID L. HILLER, 1737 Gaylord Street, Denver, Colorado, appearing for Plaintiffs.

98pa

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PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

Court that we would like to go forward in that way.

THE COURT: Well, um, first of all, we are not here to punish the government. Secondly, the reversionary aspect of a judgment I think is necessarily the exception rather than the rule. That is there must be some highly unique facet of a case that warrants the imposition of a reversionary interest in the government tort-feasor, or any other tort-feasor for that matter, that would serve the best interests of the child before the reversion can be ordered.

The establishment of an appropriate trust which will insure independent fiduciary supervision and control of these assets, and that can extend beyond the life of the parents, goes a long way toward mitigating against a consideration of any reversion in this case.

Now I say an appropriate trust, having not any instruments before me, I can't determine what might be appropriate. But what is different in this case from the ordinary tort case in which a victim of a tort receives an award isn't only; one, the minority of the child; two, the catastrophic disability of the child, that is the child simply has no prospect of ever being able to have a voice in the administration of these funds, but also there are -- the funds are vast. And that does put a different complexion on this case.

What I have not heard is that the parents have any

demonstrated investment abilities. I think the case screams for the expertise that can be brought to bear on the management, preservation of these funds by a trustee fully bonded so that the funds can be preserved, managed and maximized for their intended purpose on behalf of the beneficiary, the child.

If that form of instrument is presented to me, and the terms are appropriate, then my inclination is to say that a reversion is probably not warranted in this case.

If the government were to argue otherwise, then the reversionary interest being necessarily in the interests of the government and an exception to the general rule, I think the government bears the burden of showing that highly unique reason why reversion in some manner serves the best interest of his child under the circumstances of this case.

Now that may be very difficult to do given an appropriate trust. I haven't heard from you, Mr. Taylor, as to your position, but the suggestion of a trust sounds wholly appropriate to me, and I think that's probably where we are going. Now whether or not the government is going to propose some reversionary clause in the trust, I just don't know.

MR. TAYLOR: Your Honor, I like Mr. Don have reviewed the Hall briefs that were filed, and I have talked to the assistant, I think it was in Oklahoma, who handled the Hall case, and I talked to the Department of Justice attorney who

argued in the 10th Circuit, and I have reviewed the cases, and I think that in this case a trust is appropriate, and the government would certainly encourage the Court to use a trust instrument to protect the assets for the benefit of Tasha, and use a trustee that's fully bonded.

I think the Court has pinpointed several problems that arise when we have this large amount of money, and the potential problems that can arise with the people who are the caregivers, and I think that the Court has stated those problems, and I think that --

THE COURT: Well, not as a matter of fact.

MR. TAYLOR: No, but I mean a potential problem --

THE COURT: Frankly, and it is as I get older I suppose I become more cynical of the base intention of human nature which I see on a day-to-day basis, and I want to tend to guard against those. That's not to say that I have any evidence that those types of potential base intentions rest in these two parents.

MR. TAYLOR: Your Honor, one thing that hasn't been considered, though, is if the parents, one or both of them, were to die prematurely, where that leaves the estate.

THE COURT: Well, see, a trust properly structured covers that. I mean I contemplate frankly that now we are getting into the specific terms of the trust, and I am not sure I want to do that, because I do have a matter that I'm trying

now. If there is an independent trustee, and it's an institution, that's one of the reasons why we have trusts with institutions serving as trustees so as to bridge generation gaps, and that takes care of that problem.

MR. TAYLOR: To some extent, except that we then have the possibility of the heirs to her estate having desires on the vast fortune that supports her, and that could be a problem.

THE COURT: Well, not if you have trustee that's exercising fiduciary duty on behalf of the beneficiary.

MR. TAYLOR: The Court in its opinion --

THE COURT: Now you know if we put the money in the bank, if we give the money to the parents as their -- as natural guardian ad litems, I suppose -- and they just simply put the money in the bank, that's the problem. But if you have an institutional trustee subject to a very high fiduciary duty on behalf of the beneficiary, that problem is alleviated, particularly if I retain jurisdiction to supervise the trust.

Even in the event that one or both parents are named as co-trustees, in the event of any loggerhead between the co-trustee and individual parent, and the trustee institution, I think I would have ongoing supervisory jurisdiction over that trust.

MR. TAYLOR: Well, in addition to the potential problems of the heirs who might inherit, either the parents or

siblings, or whoever, and what problems, conscious or subconscious, that could arise in the care given to her, there is also the Colorado statute that we argued about during the trial about periodic payments. The health care provider statute. That statute provides that when the plaintiff dies that the periodic payments would stop so --

THE COURT: We have stipulated that that statute doesn't apply here.

MR. TAYLOR: We did, as far as the periodic payments go, and we wouldn't -- we do not say -- the argument isn't that the statute applies to the government, but the argument is that there is a public policy that the Colorado legislature has put forth that when a tort-feasor has to pay long-term care of an injured party, then when that party dies the payments stop.

THE COURT: But if a lump sum payment is paid to the trustee, then the government has discharged and satisfied the judgment.

MR. TAYLOR: That's --

THE COURT: And then it's just simply a matter of trust administration, and the statute just simply doesn't apply.

MR. TAYLOR: That's correct, your Honor, but the argument is that the public policy encompassed in that statute provides that the tort-feasor pays until that person dies, and that since there Is going to be a trust set up, we would argue

that a corollary to the public policy encompassed in that statute is that in a situation where we have such a vast amount of money involved, that it would be in concert with that public policy to have a reversionary interest to the government.

THE COURT: Well, the statute has been stipulated out of this case. We made a very clear record about that. The reversionary question is one that arises as a facet of the Court's inherent authority recognized by Hall, and I just simply don't believe that the statute applies at all.

Certainly there is nothing in Hall that indicates that one looks to a statute like this to determine whether to exercise jurisdiction to provide for reversion because the public policy expressed in that statute is one in favor of the tort-feasor, frankly. And the interest that guides me in looking at a reversion is the best interest of the child. The circuit has told me in essence to disregard the public policy expressed in this statute. And we have agreed by express stipulation that this case, a federal case, isn't going to be governed in any way by this statute. Well, what I think we should do is we need to get definition, and definition can begin by the submission of a proposed trust. I think that's the way to go at this. And then we can then determine where we want to go from there.

It may well be that -- well, I just think the ball is in the plaintiff's court to submit a proposed trust for the

receipt of the child's damage award.

Now if -- and I can't tell the government not to raise the question of reversion, I can -- we have kind of I think analyzed the rule of Hall somewhat -- but I think that they will give us an opportunity to determine whether there is some basis that the government wishes to advance as to the reversion question, but I think the trust frankly, if appropriate, goes far toward the elimination of the concerns giving rise to the need for reversion. But I -- that's dependent on the terms of the trust.

How much time do you need?

MR. DON: Well, your Honor, I would like to address this immediately and see if it can be resolved immediately. So I would turn my attention to it forthwith.

THE COURT: Thirty days?

MR. DON: Um, do you contemplate having another hearing?

THE COURT: Yeah, I think we are going to have to take this a step at a time. I do, but I think what I would suggest is that the matter be placed before me by an appropriate motion, accompanied by the proposed trust with an opportunity to the government to respond, and then I will set another hearing.

And certainly I am not and won't be the judge necessarily who would supervise the trust over any period of

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In the Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT E. HILL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a suit under the Federal Tort Claims Act, the court of appeals erred in directing the district court to grant the United States a reversionary interest in a trust established to fund the injured party's future care, so as to treat the United States in a manner similar to the treatment accorded private defendants under applicable state law.

2. Whether the court of appeals erred in concluding that the United States did not waive the reversionary trust issue before the district court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1pa-10pa) is reported at 81 F.3d 118. The opinions of the district court (Pet. App. 16pa-26pa and 27pa-48pa) are reported at 854 F. Supp. 727 and 864 F. Supp. 1030.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1996. The petition for a writ of certiorari was filed on May 6, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Colorado Health Care Availability Act, Colo. Rev. Stat. Ann. § 13-64-201 *et seq.* (West 1989) (HCAA) (Pet. App. 68pa-80pa), when medical care institutions and professionals are found liable in Colorado state courts for medical torts, future damages are compensated through periodic payments. Colo. Rev. Stat. Ann. § 13-64-203(1) (West 1989). The periodic payments must be funded in full within 60 days after entry of the judgment. Colo. Rev. Stat. Ann. § 13-64-208(1) (West 1989). They may be funded, *inter alia*, by the defendant's purchase of an annuity contract or United States, Colorado, or other qualified public obligations. Colo. Rev. Stat. Ann. § 13-64-207(1) (West 1989). Upon the death of the tort victim, the periodic payments cease. Colo. Rev. Stat. Ann. § 13-64-206(3) (West 1989).[1] Otherwise, "were the tort victim to die prematurely, the unspent medical and related damages would accrue to the estate of the victim and thus represent a windfall to the victim's heirs." Pet. App. 6pa.

2. Tasha Hill, a minor, was seriously injured as a result of the government's negligence at Army medical facilities in Colorado. Pet. App. 4pa. In a suit brought under the Federal Tort Claims Act (FTCA), the government conceded liability, and the district

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[1] Payments awarded to compensate for lost future earnings are not terminated upon the death of the tort victim, but are instead made to his or her heirs and devisees. Colo. Rev. Stat. Ann. § 13-64-206(3) (West 1989). The trial court, moreover, may "for good cause shown" specify in the judgment that all periodic payments are to continue for a certain term of years notwithstanding the death of the tort victim during such term. Colo. Rev. Stat. Ann. § 13-64-206(2) (West 1989).

court awarded damages of $13,528,400 to Tasha and $1,017,500 to her parents. *Id.* at 46pa-47pa. Of the damages awarded to Tasha, $10,019,800 were to compensate her for future life care costs such as living expenses, medical care, and rehabilitation services. *Id.* at 34pa-41pa, 46pa.

The parties stipulated that the Colorado HCAA, with its periodic payment requirement, did not apply to the United States. Pet. 8-10. The parties agreed that it would be appropriate to place the future life care portion of Tasha's award in a trust for her benefit. Pet. App. 19pa. The government requested, however, that the trust instrument contain a reversionary clause in its favor, to put it on the same footing as similarly situated private defendants under the HCAA. *Id.* at 22pa. The district court denied that request. *Id.* at 19pa-23pa.

2. The court of appeals reversed in part and remanded.[2] It acknowledged that the United States may not be ordered to make periodic payments under the FTCA, Pet. App. 6pa (citing *Hull* v. *United States*, 971 F.2d 1499, 1505 (10th Cir. 1992), cert. denied, 507 U.S. 1030 (1993)), and that the HCAA accordingly "does not itself apply to the government," *ibid.* The court recognized, however, that, "under the FTCA, the government is to be treated 'in the same manner and to the same extent as a private individual under like circumstances' depending on the law of the state where the tort occurred." *Id.* at 6pa (quoting 28 U.S.C. 2674). It concluded (Pet. App. 8pa) on that ground that the district court should have created a

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[2] The court rejected the government's challenge to the amount awarded Tasha's parents for her past care. Pet. App. 4pa-5pa.

trust with a reversionary interest in the government, in order to "approximate the result contemplated by the HCAA." As under the HCAA, no part of the award for medical damages intended for the victim of malpractice would accrue to the victim's heirs upon her death. It remanded the case "in order for the district court to create such a trust." *Id.* at 9pa.

ARGUMENT

Petitioners dispute (Pet. 12-22) the court of appeals' holding that the HCAA cannot lawfully be applied to the federal government and its conclusion that the use of a reversionary trust in this case will approximate the treatment of private defendants under the HCAA. They contend (Pet. 22-27), moreover, that the United States waived its right in this case to rely in any way on the HCAA.

1. Petitioners argue (Pet. 18) that, notwithstanding the absence of judicial authority to order the federal government to make periodic payments, the HCAA may lawfully be applied to the government. They assert (Pet. 18 n.4) that "the government could simply refuse to fund the periodic payments and thus be ordered to pay the present value of the future damages pursuant to Section [208(2)] of the HCAA." That is incorrect. Under the HCAA, a court may order a defendant to make a lump sum payment only upon the defendant's failure to comply with an earlier order directing the defendant to provide funding for periodic payments. Colo. Rev. Stat. Ann. § 13-64-208(2) (West 1989). Since the courts have no authority to issue judgments requiring the federal government to fund periodic payments in the first place, see, *e.g.*, *Hull*, 971 F.2d at 1505; *Frankel* v. *Heym*, 466 F.2d 1226, 1228-1229 (3d Cir. 1972), the

courts' authority to order a lump sum payment under the HCAA cannot be triggered in suits against the government.

2. Petitioners argue (Pet. 14-18, 20-21) that the use of a reversionary trust violates the FTCA's requirement that the federal government should be liable "in the same manner and to the same extent as a private individual under the same circumstances." See 28 U.S.C. 2674. First, petitioners observe that the court of appeals "ma[de] no reference" to Section 206(2) of the HCAA, which permits a court "for good cause shown" to specify in the judgment that a fixed number of periodic payments will be made irrespective of whether the injured party dies before the last of such payments. Pet. 14 (quoting Colo. Rev. Stat. Ann. § 13-64-206(2) (West 1989)). The court of appeals, however, merely directed the district court to "create a reversionary trust that would approximate the result contemplated by the HCAA." Pet. App. 8pa. The terms of remand do not prevent the district court from entertaining a motion to require the government to make a fixed number of payments, as under Colo. Rev. Stat. Ann. § 13-64-206(2) (West 1989), "for good cause shown."

Second, petitioners argue (Pet. 15-18) that permitting the federal government to retain a reversionary interest in the trust treats the government more leniently than a private defendant. A private defendant, however, is permitted to satisfy a tort judgment through the purchase of an annuity from a licensed insurance company. See Colo. Rev. Stat. Ann. § 13-64-207(1)(a) (West 1989). As petitioners acknowledge (Pet. 16-17), the price of such an annuity takes into account the actuarial probability of the tort victim's premature death. The defendant's monetary

obligation is thus determined by the expected present value of the periodic payment obligation. Although the United States is not (and, indeed, could not be) forced by the court of appeals' ruling to purchase an annuity to fund periodic payments, the use of a reversionary trust will cause the government's obligation to approximate the cost of a periodic payment obligation. We acknowledge that that result will not put the government in precisely the same position as a private defendant under the HCAA. The expected present value of a periodic payment obligation will only by fortuity equal the actual cost of such obligation, and (unlike a private defendant) the government is not forced to pay a premium to a third party annuity provider. But use of a reversionary trust does *approximate* the treatment of a private defendant. Moreover, it does so far more closely than would a trust lacking a reversionary feature, which would put the government in a considerably worse position than that of a private defendant under the HCAA.[3]

3. Petitioners argue (Pet. 21 n.5) that they were prejudiced because their trial evidence as to future

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[3] It should be noted, moreover, that Tasha is more favorably treated under the court of appeals' ruling than she would have been under the HCAA's periodic payment scheme. Damages will be paid by the United States to the trust in a lump sum and, under the terms of the trust instrument (as drafted by petitioners and approved by the district court), payments may be made from the trust as needed for Tasha's care "so as to maximize her enjoyment of life and to extend her life." Pet. App. 24pa (quoting trust instrument). The court's ruling thus offers both the benefit of accrual of investment income that is ordinarily associated with lump sum damages and significant flexibility respecting the timing and amount of payments from the trust for Tasha's care.

inflation rates assumed payment of a lump sum judgment, not periodic payments as under the HCAA. They observe (*ibid.*) that periodic payment arrangements entail additional inflation risk. To the extent that inflation rates turn out to be higher than expected, periodic payments will not buy as much future care as expected. When damages are paid in a lump sum, on the other hand, higher inflation rates may be offset by higher rates of interest earned on the principal. Petitioners claim that, if they had known that the court would grant the government a reversionary interest in the trust, they would have presented evidence of higher expected inflation rates. *Ibid.*

Petitioners' argument is without merit. To begin with, there is no reason that petitioners' experts' views regarding expected future inflation rates should depend on the form of the judgment in this case. Estimates of future inflation rates have nothing to do with the method of payment adopted in a particular case. See generally *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523, 547-551 (1983) (explaining the use of inflation testimony in computing awards of future damages).

Moreover, even if petitioners' inflation rate testimony would have differed had this case been subject to the HCAA's periodic payment requirement, that would not support petitioners' argument. Although the court of appeals ordered the district court to employ a reversionary feature in order to treat the government in a manner comparable to private parties under the HCAA, the damages in this case will not be paid by the government periodically. Rather, the damages in this case will be deposited in a lump sum in a trust, from which amounts may be withdrawn by

the trustee—one of petitioners' counsel—as needed for Tasha's care. Pet. App. 24pa. Since the trust will accrue interest, Tasha will be exposed to no greater inflation risk than if she had received the lump sum free of the trust.

4. Finally, petitioners argue (Pet. 22-27) that the court of appeals erred in ruling (Pet. App. 9pa n.1) that the government did not waive the reversionary trust issue before the trial court. Contrary to petitioners' assertion, the government never waived its right to argue that the award in this case should be in the form of a reversionary trust. The government stipulated only that it would not, indeed could not, ask the district court to require the government to make periodic payments in accordance with the HCAA. The court of appeals correctly recognized that distinction. In all events, the court's understanding of the record in this case is not a matter that warrants this Court's review. See, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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